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SCHOOL OF LAW

CASES

ON

THE LAW OF INSURANCE

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

BY

WILLIAM REYNOLDS VANCE

DEAN OF THE LAW SCHOOL, UNIVERSITY
OF MINNESOTA

AMERICAN CASEBOOK SERIES

JAMES BROWN SCOTT
GENERAL EDITOR

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THE AMERICAN CASEBOOK SERIES

For years past the science of law has been taught by lectures, the use of text-books and more recently by the detailed study, in the class-room, of selected cases.

Each method has its advocates, but it is generally agreed that the lecture system should be discarded because in it the lecturer does the work and the student is either a willing receptacle or offers a passive resistance. It is not too much to say that the lecture system is doomed.

Instruction by the means of text-books as a supplement or substitute for the formal lecture has made its formal entry into the educational world and obtains widely; but the system is faulty and must pass away as the exclusive means of studying and teaching law. It is an improvement on the formal lecture in that the student works, but if it cannot be said that he works to no purpose, it is a fact that he works from the wrong end. The rule is learned without the reason, or both rule and reason are stated in the abstract as the resultant rather than as the process. If we forget the rule we cannot solve the problem; if we have learned to solve the problem it is a simple matter to formulate a rule of our own. The text-book method may strengthen the memory; it may not train the mind, nor does it necessarily strengthen it. A text, if it be short, is at best a summary, and a summary presupposes previous knowledge.

If, however, law be considered as a science rather than a collection of arbitrary rules and regulations, it follows that it should be studied as a science. Thus to state the problem is to solve it; the laboratory method has displaced the lecture, and the text yields to the actual experiment. The law reports are in more senses than one books of experiments, and, by studying the actual case, the student co-operates with the judge and works out the conclusion however complicated the facts or the principles involved. A study of cases arranged historically develops the knowledge of the law, and each case is seen to be not an isolated fact but a necessary link in the chain of development. The study of the case is clearly the most practical method, for the student already does in his undergraduate days what he must do all his life; it is curiously the most theoretical and the most practical. For a discussion of the case in all its parts develops analysis, the comparison of many cases establishes a general principle, and

the arrangement and classification of principles dealing with a subject make the law on that subject.

In this way TRAINING AND KNOWLEDGE, the means and the end of legal study, go hand and hand.

The obvious advantages of the study of law by means of selected cases make its universal adoption a mere question of time.

The only serious objections made to the case method are that it takes too much time to give a student the requisite knowledge of the subject in this way and that the system loses sight of the difference between the preparation of the student and the lifelong training of the lawyer. Many collections of cases seem open to these objections, for they are so bulky that it is impossible to cover a particular subject with them in the time ordinarily allotted to it in the class. In this way the student discusses only a part of a subject. His knowledge is thorough as far as it goes, but it is incomplete and fragmentary. The knowledge of the subject as a whole is deliberately sacrificed to training in a part of the subject.

It would seem axiomatic that the size of the casebook should correspond in general to the amount of time at the disposal of instructor and student. As the time element is, in most cases, a nonexpansive quantity, it necessarily follows that, if only a half to two-thirds of the cases in the present collections can be discussed in class, the present casebooks are a third to a half too long. From a purely practical and economic standpoint it is a mistake to ask students to pay for 1,200 pages when they can only use 600, and it must be remembered that in many schools, and with many students in all schools, the matter of the cost of casebooks is important. Therefore, for purely practical reasons, it is believed that there is a demand for casebooks physically adapted and intended for use as a whole in the class-room.

But aside from this, as has been said, the existing plan sacrifices knowledge to training. It is not denied that training is important, nor that for a law student, considering the small amount of actual knowledge the school can hope to give him in comparison with the vast and daily growing body of the law, it is more important than mere knowledge. It is, however, confidently asserted that knowledge is, after all, not unimportant, and that, in the inevitable compromise between training and knowledge, the present casebooks not only devote too little attention relatively to the inculcation of knowledge, but that they sacrifice unnecessarily knowledge to training. It is believed that a greater effort should be made to cover the general principles of a given subject in the time allotted, even at the expense of a considerable sacrifice of detail. But in this proposed readjustment of the means to the end, the fundamental fact cannot be overlooked that law is a developing science and that its present can only be understood through the medium of its past. It is recognized as imperative that a sufficient number of cases be given under each topic

treated to afford a basis for comparison and discrimination; to show the development of the law of the particular topic under discussion; and to afford the mental training for which the case system necessarily stands. To take a familiar illustration: If it is proposed to include in a casebook on Criminal Law one case on abortion, one on libel, two on perjury, one on larceny from an office, and if in order to do this it is necessary to limit the number of cases on specific intent to such a degree as to leave too few on this topic to develop it fully and to furnish the student with training, then the subjects of abortion, libel, perjury, and larceny from an office should be wholly omitted. The student must needs acquire an adequate knowledge of these subjects, but the training already had in the underlying principles of criminal law will render the acquisition of this knowledge comparatively easy. The exercise of a wise discretion would treat fundamentals thoroughly; principle should not yield to detail.

Impressed by the excellence of the case system as a means of legal education, but convinced that no satisfactory adjustment of the conflict between training and knowledge under existing time restrictions has yet been found, the General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the class-room, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest.

The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject.

It is equally obvious that some subjects are treated at too great length, and that a less important subject demands briefer treatment. A small book for a small subject.

In this way it will be alike possible for teacher and class to complete each book instead of skimming it or neglecting whole sections; and more subjects may be elected by the student if presented in shorter form based upon the relative importance of the subject and the time allotted to its mastery.

Training and knowledge go hand in hand, and Training and Knowledge are the keynotes of the series.

If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief.

For the basis of calculation the hour has been taken as the unit. The General Editor's personal experience, supplemented by the experience of others in the class-room, leads to the belief that approximately a book of 400 pages may be covered by the average student in half a year of two hours a week; that a book of 600 pages may be discussed in class in three hours for half a year; that a book of 800 pages may be completed by the student in two hours a week throughout the year: and a class may reasonably hope to master a volume of 1,000 pages in a year of three hours a week. The general rule will be subject to some modifications in connection with particular topics on due consideration of their relative importance and difficulty, and the time ordinarily allotted to them in the law school curriculum.

The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.
Agency.
Bills and Notes.
Carriers.
Contracts.
Corporations.
Constitutional Law.
Criminal Law.
Criminal Procedure.
Common-Law Pleading.
Conflict of Laws.
Code Pleading.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.
Insurance.
International Law.
Jurisprudence.
Mortgages.
Partnership.
Personal Property, including the Law of Bailment.
Real Property. { 1st Year. / 2d " / 3d "
Public Corporations.
Quasi Contracts.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical,

and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

As an introduction to the series a book of Selections on General Jurisprudence of about 500 pages is deemed essential to completeness.

The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the class-room and the needs of the students will furnish a sound basis of selection.

While a further list is contemplated of usual but relatively less important subjects as tested by the requirements for admission to the bar, no announcement of them is made at present.

The following gentlemen of standing and repute in the profession have written or are at present actively engaged in the preparation of the various casebooks on the indicated subjects:

George W. Kirchwey, Professor of Law, Columbia University, School of Law. *Subject, Real Property.*

Nathan Abbott, Professor of Law, Columbia University. (Formerly Dean of the Stanford University Law School.) *Subject, Personal Property.*

Frank Irvine, Dean of the Cornell University School of Law. *Subject, Evidence.*

Harry S. Richards, Dean of the University of Wisconsin School of Law. *Subject, Corporations.*

James Parker Hall, Dean of the University of Chicago School of Law. *Subject, Constitutional Law.*

William R. Vance, Dean of the University of Minnesota Law School. *Subject, Insurance.*

Charles M. Hepburn, Professor of Law, University of Indiana. *Subject, Torts.*

William E. Mikell, Professor of Law, University of Pennsylvania. *Subjects, Criminal Law and Criminal Procedure.*

George P. Costigan, Jr., Professor of Law, Northwestern University Law School. *Subject, Wills and Administration.*

Floyd R. Mechem, Professor of Law, Chicago University. *Subject, Damages.* (Co-author with Barry Gilbert.)

Barry Gilbert, Professor of Law, University of Iowa. *Subject, Damages.* (Co-author with Floyd R. Mechem.)

Thaddeus D. Kenneson, Professor of Law, University of New York. *Subject, Trusts.*

Charles Thaddeus Terry, Professor of Law, Columbia University. *Subject, Contracts.*

Albert M. Kales, Professor of Law, Northwestern University. *Subject, Persons.*

Edwin C. Goddard, Professor of Law, University of Michigan. *Subject, Agency.*

Howard L. Smith, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Wm. Underhill Moore.)

Wm. Underhill Moore, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Howard L. Smith.)

Edward S. Thurston, Professor of Law, University of Minnesota. *Subject, Quasi Contracts.*

Crawford D. Hening, Professor of Law, University of Pennsylvania. *Subject, Suretyship.*

Clarke B. Whittier, Professor of Law, University of Chicago. *Subject, Pleading.*

Eugene A. Gilmore, Professor of Law, University of Wisconsin. *Subject, Partnership.*

Ernst Freund, Professor of Law, University of Chicago. *Subject, Administrative Law.*

Frederick Green, Professor of Law, University of Illinois. *Subject, Carriers.*

Ernest G. Lorenzen, Professor of Law, University of Wisconsin. *Subject, Conflict of Laws.*

Frederic C. Woodward, Dean of the Stanford University Law School. *Subject, Sales.*

George H. Boke, Professor of Law, University of California. *Subject, Equity.*

James Brown Scott, Lecturer on International Law and Diplomacy in Johns Hopkins University; formerly Professor of Law, Columbia University. *Subjects, International Law; General Jurisprudence.*

JAMES BROWN SCOTT,
General Editor.

WASHINGTON, D. C., October, 1914.

Following are the books of the Series now published, or in press:

Administrative Law
Agency
Bills and Notes
Carriers
Conflict of Laws
Constitutional Law
Corporations
Criminal Law
Criminal Procedure
Damages
Insurance
Partnership
Persons
Pleading
Principal and Agent
Sales
Suretyship
Trusts
Wills and Administration

AUTHOR'S PREFATORY NOTE

The compiler of a casebook on the law of insurance must resist much temptation. Cases involving the construction of the insurance contract are so numerous, and frequently so interesting, that one is sorely tempted to take them into the class-room. But with rare exceptions such cases have little to do with the distinctive rules of insurance law, unless it be to give illustration, sometimes almost grotesque, of the extent to which the courts have carried the rule, *omnia contra proferentem præsumuntur,* in the construction of insurance contracts. They have little value for instructional purposes, and are given little space in this book.

This collection is made upon the theory that better results can be gotten in the class-room by the reasonably complete presentation of a few distinctive topics than by a sketchy attempt to reflect the digest headings of the subject in hand, or the indexes of standard text-books. It is manifest that the topics selected in accordance with this theory for presentation should be those which are peculiar to, or which have had a peculiar development in the law of insurance. Of those rules peculiar to the law of insurance the most striking are those governing insurable interest, concealment, representations and warranties, while of those that have exhibited a peculiar development, the most interesting and important have to do with the much litigated questions pertaining to waiver and estoppel, and the many problems that have developed in connection with claims to the proceeds of insurance contracts when matured. Therefore an effort has been made to present as complete a collection of cases on these topics as limitation of space would permit, even though such a course has necessitated the total omission of other topics customarily treated in works on insurance.

The fact that the business of insurance is so carefully regulated by statute, as well as intrinsic interest, requires the inclusion of cases showing the nature of the contract of insurance, as distinguished from other contracts of somewhat similar character, and they are naturally followed by the chapter on making the contract.

The cases in the two final chapters, dealing with the construction of the insurance policy, are frankly illustrative. The principles of construction are simple and settled, and the cases involving their application to particular terms of the insurance contract, under special states of fact, while invaluable in the court-room, are of little value in the class-room, save as they illustrate certain tendencies on the part of

court and jury which, in turn, throw light upon the peculiar features of the contract.

Insurance cases, especially those of more recent date, are usually long and generally involve many different issues. This fact has rendered necessary frequent abbreviation of the cases printed. In omitting parts of opinions an earnest effort has been made to avoid the danger, of which every user of casebooks is painfully aware, that abbreviation may result in mutilation and misrepresentation. To this end the fact of omission has always been indicated, and, in most cases, the subject matter of the omitted portion is stated in a footnote.

W. R. VANCE.

August 28, 1914.

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CASES

ON THE

LAW OF INSURANCE

CHAPTER I

INTRODUCTORY

SECTION I.—HISTORICAL

NEW ENGLAND MARINE INS. CO. v. DUNHAM.

(Supreme Court of the United States, 1870. 11 Wall. 1, 20 L. Ed. 90.)

BRADLEY, J.[1] This case comes before us on a certificate of division in opinion between the judges of the Circuit Court for the District of Massachusetts, on appeal from the District Court of that district. * * *

The case as thus presented is as follows: A libel in personam was filed in the District Court for the District of Massachusetts, by Dunham against the New England Mutual Marine Insurance Company, on a policy of insurance, dated at Boston, on the 2d day of March, 1863, whereby the Insurance Company, a corporation of Massachusetts, agreed to insure to Dunham, the libelant, a citizen of New York, in the sum of $10,000, for whom it might concern, on a vessel called the Albina, for one year, against the perils of the seas and other perils in the policy mentioned; and the libelant alleged that within one year the said vessel was run into by another vessel on the high seas, through the negligence of those navigating the said other vessel, and sustained much damage, and that the libelant had expended large sums of money in repairing the same, of which he claimed payment of the Insurance Company; and the question is, whether the District Court, sitting in

[1] The statement of facts and part of the opinion are omitted.

admiralty, has jurisdiction to entertain a libel in personam, on a policy of marine insurance, to recover for a loss. * * *

It only remains, then, to enquire whether the contract of marine insurance, as set forth in the present case, is or is not a maritime contract.

It is objected that it is not a maritime contract because it is made on the land and is to be performed (by payment of the loss) on the land, and is therefore entirely a common law transaction. This objection would equally apply to bottomry and respondentia loans, which are also usually made on the land, and are to be paid on the land. But in both cases payment is made to depend on a maritime risk; in the one case upon the loss of the ship or goods, and in the other upon their safe arrival at their destination. So the contract of affreightment is also made on land, and is to be performed on the land by the delivery of the goods and the payment of the freight. It is true that in the latter case a maritime service is to be performed, in the transportation of the goods. But if we carefully analyze the contract of insurance we shall find that, in effect, it is a contract, or guaranty, on the part of the insurer, that the ship or goods shall pass safely over the sea, and through its storms and its many casualties, to the port of its destination; and if they do not pass safely, but meet with disaster from any of the misadventures insured against, the insurer will pay the loss sustained. So, in the contract of affreightment, the master guarantees that the goods shall be safely transported (dangers of the seas excepted) from the port of shipment to the port of delivery, and there delivered. The contract of the one guarantees against loss from the dangers of the sea, the contract of the other against loss from all other dangers. Of course these contracts do not always run precisely parallel to each other, as now stated; special terms are inserted in each at the option of the parties. But this statement shows the general nature of the two contracts. And how a fair mind can discern any substantial distinction between them, on the question whether they are or are not maritime contracts, is difficult to imagine. The object of the two contracts is, in the one case, maritime service, and, in the other, maritime casualties.

And then the contract of insurance, and the rights of the parties arising therefrom, are affected by and mixed up with all the questions that can arise in maritime commerce—jettison, abandonment, average, salvage, capture, prize, bottomry, etc.

Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom. It was unknown to the common law; and the common law remedies, when applied to it, were so inadequate and clumsy that disputes

arising out of the contract were generally left to arbitration, until the year A. D. 1601, when the statute of 43 Elizabeth was passed creating a special court, or commission, for hearing and determining causes arising on policies of insurance. The preamble to that act, after mentioning the great benefit arising to commerce by the use of policies of insurance, has this singular statement: "And whereas, heretofore such assurers have used to stand so justly and precisely upon their credits as few or no controversies have arisen thereupon, and if any have grown the same have, from time to time, been ended and ordered by certain grave and discreet merchants appointed by the Lord Mayor of the City of London, as men, by reason of their experience, fittest to understand and speedily to decide those causes, until of late years that divers persons have withdrawn themselves from that arbitrary course, and have sought to draw the parties assured to seek their moneys of every several assurer by suits commenced in Her Majesty's courts, to their great charges and delays." The commission created by this act was to be directed to the judge of the admiralty for the time being, the recorder of London, two doctors of civil law, and two common lawyers, and eight grave and discreet merchants.[2] The act was thus an acknowledgment of the jurisdiction to which the case properly belonged.

Had it not been for the jealousy exhibited by the common law courts against the Court of Admiralty, in prohibiting its cognizance of policies of insurance half a century before (4 Inst. 139), the latter court, as the natural and proper tribunal for determining all maritime causes, would have furnished a remedy at once easy, expeditious and adequate. It was only after the common law, under the influence of Lord Mansfield and other judges of enlightened views, had imported into itself the various provisions of the law maritime relating to insurance, that the courts at Westminster Hall began to furnish satisfactory relief to suitors. And even then, as remarked by Sir W. D. Evans, "the inadequacy of the existing law to settle, proprio vigore, complicated questions of average and contribution, is very manifest and notorious. Such questions are, by consent, as matter of course, and from conviction of counsel that justice cannot be attained in any other way; referred to private examination; but a law can hardly be considered as perfect which is not possessed of adequate powers within itself to complete its purpose, and which requires the intrinsic aid of personal consent." Evans, Statutes (3d ed.) vol. 2. p. 226. The contrivances to which Lord Mansfield resorted, to remedy, in a

[2] The Court of Insurance Commissioners did not prove successful. For the causes leading to its failure, see 1 Park, Ins. (6th Ed.). Introduction, pp. xxxix-xliii; 3 Blackstone, Comm. 74, 75. See, also, Denoyr v. Oyle, Style, 166 (1649); Came v. Moye, 2 Siderfin, 121 (1658); Delbye v. Proudfoot, 1 Shower, 396 (1692).

measure, these difficulties, are stated by Mr. Justice Park in the introduction to his work on Insurance.

These facts go to show, demonstrably, that the contract of marine insurance is an exotic in the common law. And we know the fact, historically, that its first appearance in any code or system of laws was in the law maritime as promulgated by the various maritime states and cities of Europe. It undoubtedly grew out of the doctrine of contribution and general average, which is found in the maritime laws of the ancient Rhodians. By this law, if either ship, freight or cargo was sacrificed to save the others, all had to contribute their proportionate share of the loss. This division of loss naturally suggested a provisional division of risk: First, amongst those engaged in the same enterprise; and next, amongst associations of ship owners and shipping merchants. Hence it is found that the earliest form of contract of insurance was that of mutual insurance, which, according to Pardessus, dates back to the tenth century, if not earlier, and in Italy and Portugal was made obligatory. By a regulation of the latter kingdom, made in the fourteenth century, every ship owner and merchant in Lisbon and Oporto was bound to contribute two per cent. of the profits of each voyage to a common fund from which to pay losses whenever they should occur. 2 Pardes. Lois Mar. 369; 6 Id. 303. The next step in the system was that of insurance upon premium. Capitalists, familiar with the risks of navigation, were found willing to guaranty against them for a small consideration or premium paid. This, the final form of the contract, was in use as early as the beginning of the fourteenth century (Pardessus, Lois Maritimes, vol. 2, pp. 369, 370; vol. 4, p. 566; vol. 5, pp. 331, 493), and the tradition is that it was introduced into England in that century by the Lombard merchants who settled in London and brought with them the maritime usages of Venice and other Italian cities.

Express regulations respecting the contract, however, do not appear in any code or compilation of laws earlier than the commencement of the fifteenth century. The earliest which Pardessus was able to find were those contained in the Ordinances of Barcelona, A. D. 1435; of Venice, A. D. 1468; of Florence, A. D. 1533; of Antwerp, A. D. 1537, etc. Pardessus, vol. 5, pp. 493, 65; vol. 4, pp. 598, 37. Distinct traces of earlier regulations are found, but the ordinances themselves are not extant. In the more elaborate monuments of maritime law which appeared in the sixteenth and seventeenth centuries, the contract of insurance occupies a large space. The Guidon de la Mer, which appeared at Rouen at the close of the sixteenth century, was an elaborate treatise on the subject; but in its discussion, the principles of every other maritime contract were explained. In the celebrated Marine Ordinance of Louis XIV, issued in 1681, it forms the subject of one of the prin-

cipal titles. Lib. 3, title 6. As is well known, it has always formed a part of the Scotch maritime law.

Suffice it to say, that in every maritime code of Europe, unless England is excepted, marine insurance constitutes one of the principal heads. It is treated in every one of those collected by Pardessus, except the more ancient ones, which were compiled before the contract had assumed its place in written law. It is, in fact, a part of the general maritime law of the world; slightly modified, it is true, in each country, according to the circumstances or genius of the people. Can stronger proof be presented that the contract is a maritime contract?

But an additional argument is found in the fact that in all other countries, except England, even in Scotland, suits and controversies arising upon the contract of marine insurance are within the jurisdiction of the admiralty or other marine courts. See Benedict's Admiralty (Ed. 1870) § 294. The French Ordinance of 1681 touching the Marine, in enumerating the cases subject to the jurisdiction of the judges of admiralty, expressly mentions those arising upon policies of assurance, and concludes with this broad language: "And generally all contracts concerning the commerce of the sea." Sea Laws, 256. The Italian writer, Roccus, says: "These subjects of insurance and disputes relative to ships are to be decided according to maritime law, and the usages and customs of these are to be respected. The proceedings are to be according to the forms of maritime courts and the rules and principles laid down in the book called 'The Consulate of the Sea,' printed at Barcelona in the year 1592." Roccus, Insurance, note 80.

It is also clear that, originally, the English admiralty had jurisdiction of this as well of other maritime contracts. It is expressly included in the commissions of the admiral. Benedict, § 48. Dr. Browne says: "The cognizance of policies of insurance was of old claimed by the Court of Admiralty, in which they had the great advantage attending all their proceedings as to the examination of witnesses beyond the seas or speedily going out of the kingdom." 2 Bro. Civ. and Adm. Law, 82. But the intolerance of the common law courts prohibited the exercise of it. In the early case of Crane v. Bell, 38 Henry VIII (1546), a prohibition was granted for this purpose.[3] See 4 Co. Inst. 139. Mr. Browne says very pertinently: "What is the rationale, and what the true principle which ought to govern this question, viz.: What contracts should be cognizable

[3] Coke's misleading report of Crane v. Bell very naturally caused this misstatement of Mr. Justice Bradley. As a matter of fact, Crane v. Bell had nothing to do with insurance. See Selden Soc. Pub. vol. vi, pp. lxviii, 129, 229. Admiralty courts continued to hear insurance cases for nearly half a century after Crane v. Bell. For example, see Moye v. Hawkyns (1573) Selden Soc. Pub. vol. xi, p. 149, in which the insurer of goods captured by pirates was subrogated to the claim of the insured against Hawkyns, the famous admiral, who had recaptured the goods.

in admiralty? Is it not this? All contracts which relate purely to maritime affairs, the natural, short and easy method of enforcing which is found in the admiralty proceedings." 2 Browne, 88. Another consideration bearing directly on this question is the fact that the commission in admiralty, issued to our colonial governors and admiralty judges, prior to the Revolution, which may be fairly supposed to have been in the minds of the convention which framed the Constitution, contained either express jurisdiction over policies of insurance or such general jurisdiction over maritime contracts as to embrace them. Benedict, ch. IX.

The discussions that have taken place in the District and Circuit Courts of the United States have not been adverted to. Many of them are characterized by much learning and research. The learned and exhaustive opinion of Justice Story, in the case of De Lovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3,776, affirming the admiralty jurisdiction over policies of marine insurance, has never been answered, and will always stand as a monument of his great erudition. That case was decided in 1815. It has been followed in several other cases in the First Circuit. Ins. Co. v. Younger, 2 Curt. 322, Fed. Cas. No. 5,487. In 1842 Justice Story, in reaffirming his first judgment, says that he had reason to believe that Chief Justice Marshall and Justice Washington were prepared to maintain the jurisdiction. What the opinion of other judges was he did not know. Hale v. Ins. Co., 2 Story, 183, Fed. Cas. No. 5,916. Doubts as to the jurisdiction have occasionally been expressed by other judges. But we are of opinion that the conclusion of Justice Story was correct.[4]

The answer of the court, therefore, to the question propounded by the Circuit Court, will be, that the District Court for the District of Massachusetts, sitting in admiralty, has jurisdiction to entertain the libel in this case.

SECTION 2.—THE NATURE OF THE CONTRACT

STATE v. HOGAN.

(Supreme Court of North Dakota, 1899. 8 N. D. 301, 78 N. W. 1051, 45 L. R. A. 166, 73 Am. St. Rep. 759.)

In the matter of the application of C. N. Hogan for a writ of habeas corpus. Writ denied.

BARTHOLOMEW, C. J. One C. N. Hogan presented to this court his petition for a writ of habeas corpus, alleging that he was unlaw-

[4] For an extensive account of the early history of insurance law, see Select Essays in Anglo-American Legal History, vol. III, pp. 98–116; 8 Columbia L. Rev. 1–17.

fully restrained of his liberty by the sheriff of Foster county, in this state. His petition sets forth that he was arrested upon a warrant issued by a justice of the peace of said county, which said warrant was based upon a complaint duly laid before said justice by one Ferguson, wherein said petitioner was accused of having acted as agent for an insurance company without having procured the certificate required by section 3124, Rev. Codes of this state, that a preliminary hearing was duly had before said justice, and that upon such hearing said justice adjudged that the petitioner be held to answer to said charge before the district court of said county, and fixed his appearance bond at the sum of $500, which the petitioner failed to give, whereupon he was duly committed to the custody of said sheriff, and was by him restrained. Copies of the complaint, the warrant, of all the testimony introduced at the hearing, of the entries in the docket of the justice and of the mittimus were attached to, and made a part, of, the petition. The writ was duly issued by this court, directed to said sheriff, who in due time made return thereto setting forth the grounds upon which he restrained the petitioner, which were substantially in all respects as shown in the petition. To this return the petitioner demurred, and upon the issues of law thus raised the case was argued to this court.

The petitioner contends (1) that a violation of the provisions of said section 3124 does not constitute a crime, under the laws of this state, and, (2) granting that such violation does constitute a crime, there is no reasonable or probable cause to believe that petitioner has committed such crime. We notice the points in this order.

Section 3124, Rev. Codes, declares: "No agent shall act for any insurance company directly or indirectly in taking risks or transacting the business of insurance without procuring from the commissioner of insurance a certificate of authority, stating that such corporation or company has complied with all the requisites of this chapter." * * *[5]

Petitioner's second proposition presents more difficulties, and, as preparatory to its discussion, we remark that no point is made by petitioner as to the regularity of any of the proceedings that led up to his incarceration. They are concededly regular. It is admitted, also, that petitioner was soliciting business as agent for a corporation known as the Realty Revenue Guaranty Company, of Minneapolis, Minn. It is admitted that petitioner never procured the certificate of authority specified in said section 3124, and that he took an application from the complaining witness in form as set forth in the evidence, and procured for said witness the contract of said company as set out in the evidence, and took the promissory note of the

[5] That part of the opinion denying the petitioner's first contention is omitted.

witness, secured by chattel mortgage, for the consideration mentioned in said contract. These admissions leave but one question for our determination: Is or is not the Realty Revenue Guaranty Company, in fact or in effect, an insurance company? If it be, then clearly the petitioner was properly held; otherwise, he should be discharged. While the attorneys representing the state claim that the oral evidence in the record strengthens their claim that said corporation is in fact an insurance company, yet we shall rest our conclusions on this point upon the documentary evidence.

Our statute (section 4441, Rev. Codes) defines insurance as follows: "Insurance is a contract whereby one undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event." Necessarily, in defining insurance in a single sentence, only the most general terms can be used, and any general definition must be extended to cover the ever-changing phases in which the subject is presented to the public. Fifty years ago it was thought that a single chapter in any work on contracts could exhaust the law of insurance. Now Mr. Joyce presents the subject in four elaborate volumes, showing the immense development of that branch of the law. Mr. Joyce expressly defines one line of insurance as guaranty insurance. See 1 Joyce, Ins. §§ 12, 13. True, guaranty insurance, as there defined, relates more particularly to guaranty against loss by reason of breaches of contract, such as "fidelity guaranty" and "credit guaranty." But we have real-estate title guaranty insurance; and, while perhaps this is the first instance where an attempt has been made to guaranty a realty revenue, yet as the revenue arising from that class of realty here involved, i. e., farming lands, is affected by so many contingencies, such as winds, hail, frost, drought, ravages of insects, etc.,—contingencies which, while not likely to happen, yet such as may occur,—it would seem that inherently it would be a proper subject for insurance, perhaps even an inviting field.

In this record we find a copy of the articles of incorporation of the Realty Revenue Guaranty Company. The second article sets forth the general business of the corporation, naming a number of things that it is organized for the purpose of doing, and, among others, "to guaranty certain rental and produce income from lands and tenements." The petitioner, as agent for said company, took from Peter Ferguson an application for a contract. * * * Upon this application, Ferguson received a contract, which we copy in full:

"This agreement, made by and between the Realty Revenue Guaranty Company, of Minneapolis, Minnesota, and Peter Ferguson, of Carrington P. O., county of Foster, and state of North Dakota, party of the second part, witnesseth that, in consideration of an application for this contract, which is hereby referred to and made a part hereof, and the payment of the sum of $55, according to the conditions of a certain promissory note for said amount, by said

party of the second part, the above-named Realty Revenue Guaranty Company agrees to purchase the entire crop of small grain, consisting of wheat, oats, flax, barley, corn, or rye, from said party of the second part, at the rate of $5.00 per acre, grown during the season of 1899; all of said crops being on the following described lands, to wit, 160 acres southeast quarter Sec. 20, T. 146, R. 65; 60 acres northwest quarter Sec. 26, T. 146, R. 65. It is further agreed that said party of the second part is in no manner bound to sell said crops to the said Realty Revenue Guaranty Company, except at his own option. It is further agreed that said party of the second part shall cultivate said crops in a husbandlike manner, sow, plant, garner, gather, harvest, thresh, and otherwise care for said crops in due season and in an economical manner. Said party of the second part agrees to notify said Realty Revenue Guaranty Company in case of any damage to said crops within five days thereafter, and of his intention to avail himself of his option to sell before said crops are harvested, and shall, within five days after threshing the same, give notice to the company of his election to sell under this contract. After said election to sell, said party of the second part agrees to deliver said crops at the nearest market, if directed so to do by said Realty Revenue Guaranty Company. Should the party of the second part fail to perform any of the conditions herein by him to be performed, time being the essence hereof, or if any of the warranties or statements made by him are untrue, the said option shall terminate. Nor shall said guaranty company be liable under this contract should any damage or loss accrue to said crops after September 15 of this year, or after said crops are harvested, nor in any manner, except as herein stipulated. This contract shall terminate December 1st following date hereof.

"In witness whereof, the said Realty Revenue Guaranty Company has caused these presents to be executed and signed by its president and secretary, and caused its corporate seal to be hereto attached, this seventh day of April, 1899. Realty Revenue Guaranty Co., by L. E. Utley, President. A. L. Brice, Secretary. [Corporate Seal.]"

What was the object of this contract and what was its legal effect? The petitioner says it was an option contract of sale of a crop. We cannot conceive that the farmer's primary object was to sell his crop. Ordinarily a man does not pay a premium for the privilege of selling his produce. Nor was it the primary purpose of the company to purchase the crop. From the very terms of the contract, it is certain that it must lose money upon all the grain it buys under the contract. Moreover, grain is bought and sold by the bushel, and not by the acre. We think the contract was the identical contract which the articles of incorporation authorize the company to enter into. It was a contract by which the guarantor undertook to guaranty or assure to the farmer a certain revenue from his land. How

did the parties proceed to execute such a contract? It was well known to both parties that an acre of land in this state, farmed as the farmer contracts to farm it in this case, will produce a crop of a value far in excess of five dollars, and the value can be reduced to or below that figure only by the happening of one or more of the contingencies hereinbefore mentioned. But such contingencies may happen, and to be absolutely assured that his land will yield him at least five dollars per acre the farmer is willing to pay something; and the corporation, expecting to do business over a wide scope of country, believes that it can with profit to itself assure the farmer a crop worth five dollars per acre for the compensation which the farmer is willing to pay therefor. But what is this in substance except a contract to indemnify the farmer against loss arising from the happening of a contingent event, and that is our statutory definition of insurance. The farmer was seeking and paying for protection, and the corporation was seeking to make a profit by extending this protection for the consideration paid by the farmer. True, it is not all loss that is insured against. The contingencies named may reduce the value of a crop from twenty dollars per acre until, in the judgment of the owner, it barely exceeds five dollars per acre, and there is no liability under the contract. It is the loss below five dollars per acre that is insured against. The effect of the contract is very like that of a valued policy of insurance. When the contingency happens that creates a liability under the policy, then the full amount of the policy must be paid, but the insured is entitled to all the salvage.

In Claflin v. System Co., 165 Mass. 501, 43 N. E. 293, 52 Am. St. Rep. 528, the defendant was held to be an insurance company. The contract is thus stated by the court: "It was made on April 6, 1891, and purports to bind the defendant, in consideration of a sum paid, to purchase at a fixed price the accounts which during one year a certain business firm should have against ascertained insolvent debtors, or judgment debtors against whom execution should be returned unsatisfied." A contract to purchase bad accounts and judgments at a fixed price, irrespective of value, cannot be distinguished in principle from a contract to purchase damaged crops at a fixed price, irrespective of value. That same company was held to be an insurance company in Shakman v. Same, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920, and the reasoning of the court is very pertinent to this case.

It is doubtless true that there has been a studied effort to keep this corporation outside the operation of our insurance laws; but the purpose and effects of its contracts are too clear to admit of doubt. They exactly meet the requirements of an insurance contract, and the corporation for which petitioner acted as agent is an insurance company. The act charged in the complaint is a crime under our statutes, and there is reasonable and probable cause to

believe the petitioner guilty of committing the act. He is therefore properly held.

The writ issued in this case is discharged, and petitioner remanded to the custody of the sheriff of Foster county. All concur.[6]

[6] Contract to Defend Physicians against Malpractice Suits.—In Physicians' Defense Co. v. Cooper, 199 Fed. 576, 118 C. C. A. 50, 47 L. R. A. (N. S.) 290 (1912), and Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N. W. 396 (1907), it was held that a contract whereby for a stated consideration one of the parties bound itself to defend at its own cost all actions for malpractice as a physician that might be brought against the other during an agreed period, but not to satisfy any adverse judgment rendered, was a contract of insurance, and the company making it thereupon subject to the regulations of the insurance department. But the same contract was held to be one of personal service only, and not of insurance, in Vredenburgh v. Physicians' Defense Co., 126 Ill. App. 509 (1906), and Physicians' Defense Co. v. Laylin, 73 Ohio St. 90, 76 N. E. 567 (1905). See 25 Harv. Law Rev. 390.

Other Indemnity Contracts.—A contract to repair bicycles, and to replace those accidentally lost or stolen, for an annual fee, has been held not to be one of insurance. Com. v. Providence Bicycle Ass'n, 178 Pa. 636, 36 Atl. 197, 36 L. R. A. 589 (1897). But an association of lumber dealers for the purpose of "exchanging insurance" has been held to be subject to the insurance laws of Mississippi, although it was purely mutual and its operation was confined to the members of the association. State v. Alley, 96 Miss. 720, 51 South. 467 (1910). Contra: Blanchard Co. v. Hamblin, 162 Mo. App. 242, 144 S. W. 880 (1912).

Railway relief associations, established by most of the great railway corporations for the benefit of their employés, are generally held not to be engaged in the business of insurance. See Beck v. Pa. Ry. Co., 63 N. J. Law, 232, 43 Atl. 908, 76 Am. St. Rep. 214 (1899); Colaizzi v. Pa. Ry. Co., 208 N. Y. 275, 101 N. E. 859 (1913); State v. Pittsburg, etc., Ry. Co., 68 Ohio St. 9, 67 N. E. 93, 64 L. R. A. 405, 96 Am. St. Rep. 635 (1903); Johnson v. P. & R. Ry. Co., 163 Pa. 127, 29 Atl. 854 (1894). See, also, Clements v. L. & N. W. Ry. Co. [1894] 2 Q. B. 482.

The provision frequently found in contracts of building and loan associations whereby, in case of death or disability of the other party to the contract, any existing balance of debt under the contract shall be thereby discharged, transforms such contracts into insurance contracts, and renders the companies issuing them subject to the insurance laws of the state in which the contract is made. State v. Beardsly, 88 Minn. 20, 92 N. W. 472 (1902). So, also, many "investment" companies are really carrying on the business of insurance and subject to the laws governing that business. See Joseph v. Law Integrity Ins. Co., [1912] 2 Ch. 581; Prudential Ins. Co. v. Inland Revenue Com'rs, [1914] 2 K. B. 658. But see State v. Federal Investment Co., 48 Minn. 110, 50 N. W. 1028 (1892).

Burglary Insurance.—See Saqui v. Stearns (C. A.), [1911] 1 K. B. 426, In re George and the Goldsmiths and General Burglary Insurance Association, Limited, [1899] 1 Q. B. 595; Pearlman v. Metropolitan Surety Co., 127 App. Div. 539, 111 N. Y. Supp. 882 (1908). As to the construction of burglary and theft insurance policies, see Rosenthal v. American Bonding Co. (1912) 207 N. Y. 162, 100 N. E. 716, 46 L. R. A. (N. S.) 561 (extensive note), and Axe v. Fidelity & Casualty Co. (1913) 239 Pa. 569, 86 Atl. 1095, 46 L. R. A. (N. S.) 574.

PATERSON v. POWELL.

(Court of Common Pleas, 1832. 9 Bing. 320.)[7]

Assumpsit. Plaintiff declared upon a contract whereby the defendant in consideration of a premium paid at the rate of forty guineas for £100., promised to pay the plaintiff £100. "in case the Imperial Brazilian Mining shares be done at or above £100. per share on or before the thirty-first day of December, 1829." Plea, general issue. A verdict was found for the plaintiff with £100. damages, and a rule nisi to enter a nonsuit was obtained by the defendant.

During the argument upon this rule the court suggested that the contract was a policy of insurance, and void under 14 Geo. 3, c. 48, and directed argument on this question. Following is the argument in part of

Coleridge, Serjt., for the plaintiff. The plaintiff is entitled to recover his whole demand; for the contract on which he sues constitutes, in effect, a wager on an innocent topic, and not a policy of insurance prohibited by 14 Geo. 3, c. 48. That an action will lie for the recovery of a sum depending on an innocent wager cannot now be disputed. Cousins v. Nantes, 3 Taunt. 513. The present contract falls within the definition of a wager, and not within any of the definitions of a policy of insurance. Johnson defines a wager, "Anything pledged upon a chance of performance;" and cites, "Love and mischief made a wager which should have most power in me." A bet he defines, "Something laid to be won on certain conditions." A wager, therefore, is a contract for the payment of an absolute value. But a policy of insurance is essentially a contract of indemnity; for every policy of insurance must insure some thing or person from some risk to which that thing or person is liable; i. e., must indemnify the assured from the consequences attendant on the happening of that risk, and the risk insured against ought to be one in which the party insured has an interest. In Lucena v. Crawford, 2 N. R. 270, among the reasons advanced for reversing the judgment below, it is said, "There is a material distinction between a contract of wager and a contract of insurance; the first may have for its subject any speculative chance or expectation, however vague or uncertain, and may be claimed without proof of loss or damage having accrued to the party for whose benefit it is demanded; but a contract of insurance cannot have such chance or expectation for its object, because bare chance or expectation, though liable to failure and disappointment, are not susceptible of loss or damnification, and therefore cannot be made the objects of an indem-

[7] The statement of facts is much abbreviated, and the arguments of counsel omitted for the most part.

nity, which presupposes the loss of some right of property either in possession or in action."

Tindal, C. J. In the view which the court takes of this case, it becomes necessary to recur to the grounds on which the rule for a new trial was obtained, because we are all of opinion, that the instrument on which the plaintiff has sued is a policy of insurance within the statute 14 Geo. 3, c. 48, the plaintiff having no interest in the subject-matter of the insurance, and no disclosure being made of any party who has such interest: the policy in that respect presents only a blank. First, what was the object of the statute 14 Geo. 3? To prevent gambling under the form and pretext of a policy of insurance by parties who have no interest in the subject-matter of such assurance. There is a statute of the former reign, 19 Geo. 2, c. 37, confined indeed to marine insurances, but the preamble of which is not immaterial in considering the intention of the Legislature in passing the statute 14 Geo. 3. After reciting, that "it had been found by experience, that the making assurances, interest or no interest, or without further proof of interest than the policy, had been productive of many pernicious practices, whereby great numbers of ships, with their cargoes, had either been fraudulently lost and destroyed, or taken by the enemy in time of war: and by introducing a mischievous kind of gaming or wagering, under the pretence of assuring the risk on shipping and fair trade, the institution and laudable design of making assurance had been perverted," it goes on to prohibit insurances on ships or their cargoes, interest or no interest, or without further proof of interest than the policy, *or by way of gaming or wagering*. The object, therefore, was to prevent gambling insurances: but, in the next reign, it was found that the legislature had not gone far enough, and then came the act of 14 Geo. 3, entitled "An act for regulating insurances upon lives, and for prohibiting all such insurances, except in cases where the person insuring shall have an interest in the life or death of the person insured." It is a well-established rule of construction, that the title of an act will not extend its effect beyond the meaning of the operative words; but neither will it confine the effect; and the operative words here are larger than the title. "No insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, *or on any other event or events whatsoever,* wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, *or by way of gaming or wagering.*" Nothing can be more clear than that these operative words were inserted in furtherance of the principle of the former act. It has been argued, that the provisions of the act are confined to cases where there is a subject-matter of insurance exposed to peril. If so, what construction are we to put upon those more general words,

"or on any event or events whatsoever," which appear to have been inserted, as it were, in anticipation of such an argument? Then, the only two cases on the statute are insurances on *events* in which the parties were not interested. In Roebuck v. Hamerton [Cowper, 737], a policy upon the sex of the Chevalier D'Eon was holden to be a policy within the statute 14 Geo. 3, c. 48; and in Mollison v. Staples, Park, Ins. 640 n., where a policy was made on the event of there being an open trade between Great Britain and the province of Maryland on or before the 6th July, 1778, Lord Mansfield said "that it was as clear the plaintiff could not recover." In both cases, therefore, the decision turns not on the statute's applying to insurances where the subject-matter of insurance is legitimate, but to events in which the parties insuring have no interest.

Our decision, therefore, in this case, must turn on the provisions of the 14 Geo. 3, if this instrument can be deemed a policy. Upon that point we entertain no doubt. Here is a premium paid, in consideration of the insurers incurring the risk of paying a larger sum upon a given contingency. The instrument is open to all who may choose to subscribe, that is, without restriction of persons or numbers. It then proceeds, in the usual language of policies of insurance, "We respectively will pay or cause to be paid to ——— the sum and sums of money which we have hereunto respectively subscribed, without any abatement whatever, in case," &c. If the instrument in Roebuck v. Hamerton was rightly held to be policy, I can make no just discrimination between that instrument and the present. It is true, that the policy contains no clause about average, because the circumstances of the risk do not require it. But if the instrument can be deemed a policy without that clause, we should impair the efficacy of the act of parliament if we were to consider it as an ordinary contract. I cannot consider it as other than a policy, and if so, the plaintiff's claim must receive the same answer as was given by Lord Mansfield, in Roebuck v. Hamerton; first, that this is an insurance on an event in which the party had no interest; or, if he had, the policy does not disclose the name of any party interested.

As to the claim for a return of premium, the concurrent effect of the decisions is, that if money be paid on an illegal contract to receive a larger sum upon a certain event, the contract is executed when the event takes place, and the money paid cannot be reclaimed.

[The concurring opinions of GASELEE, BOSANQUET and ALDERSON, JJ., are omitted.]

Rule absolute.[8]

[8] See, in accord, Wharton v. De La Rive, Park, Ins. (6th Ed.) 573. Here the policy rested upon the contingency that the American colonies should achieve their independence. Lord Mansfield thought the case too clear to admit of argument.

STATE v. TOWLE.

(Supreme Judicial Court of Maine, 1888. 80 Me. 287, 14 Atl. 195.)[9]

PETERS, C. J. The state sues to recover a penalty of the defendant for acting as a soliciting agent for the Single Men's Endowment Association, a company having its home in the state of Minnesota, and doing business in this state without a license from the insurance commissioner. The question is whether or not this association is an insurance company, under the provisions of Rev. St. c. 49, § 73. The contract between the company and its patrons declares the duties which must be assumed by the single man who becomes privileged to an endowment in the association. He pays $10 as an initiation fee; $2 as annual dues each year for nine years, and as much longer as he remains single; $1.25 on the marriage of any associate; and he promises, on the pain of forfeiture of all rights accruing to him, that he will not himself marry within two years from the date of his admission to the association. For the performance by him of these undertakings, the company promises to pay to his wife, if married to him after the expiration of the two years, the sum of as many dollars as there are associates in the order, not exceeding $1,000, provided that there be that amount of money in the treasury at the time, or it can be collected by an assessment upon the associates.

No word is spoken of insurance. That it is a wagering or gambling contract, and void upon grounds of public policy, because in restraint of marriage, there is no room for doubt. The same or similar contract has been held to be void in White v. Benefit Union, 76 Ala. 251, 52 Am. Rep. 325, and in Chalfant v. Payton, 91 Ind. 202, 46 Am. Rep. 586. The counsel for both parties agree that the contract, for one reason or another, is illegal, but the counsel for the state contends that, whether the contract be legal or illegal, it is a contract of insurance, and that, as such, it falls under the supervision of the commissioner. It is not to be conceded, we think, that this contract, in the sense of any modern use of the term, is an insurance policy. No loss or casualty or peril is named for which any indemnity is promised. It is more of a betting contract on a future event. It is true that there was formerly a class of betting contracts styled "insurances," and that a narrow line once existed between gambling and betting contracts and those then denominated contracts of insurance; and the case of Paterson v. Powell, 9 Bing. 320, relied on by the state, shows how far a court was induced to go to determine that a contract similar in principle to the present was an insurance policy, in order to declare it void. The statute (4 Geo. III. c. 48) rendered speculative insurance contracts void, and, strange to say, allowed all con-

[9] The statement of facts is omitted.

tracts founded on mere bettings and gambling to be valid. At this day, the contract in that case, with all its imitations of the thing, would hardly receive the appellation of an insurance policy. It does not seem probable that the legislature intended to commit to the care of the commissioner the business of illegal or illegitimate insurance companies. It would be tolerating, instead of condemning, them. He has the power to issue and suspend licenses. But there must be cause for either act. Rev. St. c. 49, §§ 73, 75. His business is to deal with such companies as can, when licensed, issue legal policies. His act cannot confer legality upon companies doing illegal business. The state seeks to recover a penalty of $50, because the defendant acted without an official license, while the policy, if to be called such, issued by him, would be unlawful and void, whether he was acting with or without a license. It would be inconsistent to collect a penalty of an agent for not doing business under a void license. Plaintiff nonsuit.

VIRGIN, DANFORTH, LIBBEY, FOSTER, and HASKELL, JJ., concurred.

PEOPLE ex rel. KASSON v. ROSE, Secretary of State.

(Supreme Court of Illinois, 1898. 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124.)

Petition by the people, on the relation of C. Vallete Kasson, for a writ of mandamus against James A. Rose, secretary of state. Writ denied.

WILKIN, J. This is an original petition for mandamus against James A. Rose, as secretary of state. The petition sets forth that on January 27, 1898, petitioners made application to the respondent for a license authorizing them to open subscription books to the capital stock of a proposed corporation. The application was made in due form, and accompanied by the requisite fee. The object of the corporation, as contained in the statement, is as follows: "To transact in the state of Illinois and elsewhere the business of guarantying the fidelity of persons holding public or private places of trust, and the performance by persons, firms, and corporations of contracts, bonds, recognizances, and undertakings of every kind, and of becoming surety on bonds required by law, and on every kind of contract, obligation, and undertaking of persons, firms, and corporations." The secretary refused to issue the license, upon the ground that the statute under which the application is made does not authorize the organization of corporations for the objects stated in the application.

Section 1 of the statute entitled "An act concerning corporations," approved April 18, 1872, provides "that corporations may be formed in the manner provided by this act, for any lawful purpose, except banking, insurance, real estate brokerage, the opera-

tion of railroads, and the business of loaning money, provided," etc. The only question here raised is whether or not the objects, or any of them, of the proposed corporation, fall within the exception "insurance."

The following definitions of the term "insurance" are cited from standard authorities by the attorney general on behalf of the respondent:

"Guaranty insurance is a contract whereby one, for a consideration, agrees to indemnify another against loss arising from the want of integrity, fidelity, or insolvency of employés and persons holding positions of trust, against insolvency of debtors, losses in trade, losses from nonpayment of notes and other evidences of indebtedness, or against breach of contract. It includes other forms of insurance, which are specifically classified as 'fidelity guaranty,' 'credit guaranty,' etc." 1 Joyce, Ins. § 12.

"Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, prejudice, or damage by the happening of the perils specified, to certain things which may be exposed to them." Lucena v. Craufurd, 2 Bos. & P. 300.

"Insurance, in its most general sense, is a contract whereby one party agrees to indemnify another in case he shall suffer loss in respect of a specified subject by a specified peril." 11 Am. & Eng. Enc. Law, 280.

"Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss. Such, in its most general terms, is the definition of the contract which is to constitute the subject of the following chapters. It is substantially the definition given long ago by Roccus, and is recommended alike by its brevity and its comprehensiveness,—qualities upon which subsequent writers have scarcely been able to improve. * * * It had its origin in the necessities of commerce. It has kept pace with its progress, expanded to meet its rising wants and to cover its ever-widening fields, and, under the guidance of the spirit of modern enterprise tempered by a prudent forecast, it has, from time to time, with wonderful facility, adapted itself to the new interests of an advancing civilization. It is applicable to every form of possible loss. Wherever danger is apprehended or protection required, it holds out its fostering hand, and promises indemnity." 1 May, Ins. §§ 1, 2.

"A contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against certain risks." 1 Phil. Ins. § 1.

"A contract by which a person, in consideration of a gross sum or a periodical payment, undertakes to pay a larger sum on the happening of a particular event." Smith, Com. Law, 299.

"In law, a contract by which one party, for an agreed consideration, which is proportioned to the risk involved, undertakes to compensate the other for loss on a specified thing from specified causes." Cent. Dict. "Insurance."

"An act or system of insuring or assuring against loss; specifically, the system by or under which indemnity or pecuniary payment is guarantied by one party or several parties to another party, in certain contingencies, upon specified terms." Stand. Dict. "Insurance."

"The act of insuring against loss or damage by a contingent event; a contract whereby one party undertakes to indemnify or guaranty the other against loss by certain specified risks." Webst. Dict. "Insurance."

It is said in 9 Am. & Eng. Enc. Law, 65 (cited in People v. Fidelity & Casualty Co., 153 Ill. 32, 38 N. E. 752, 26 L. R. A. 295): "Guaranty insurance is, in its practical sense, a guaranty or insurance against loss in case a person named shall make a designated default, or be guilty of specified conduct. It is usually against the misconduct or dishonesty of an employé or officer, though sometimes against the breach of a contract. This branch of insurance is so much more modern in origin and development than fire, marine, life and accident insurance that there are few decisions upon the subject; but the business is gradually increasing, and is doubtless destined to take an important place in the commercial world. It may be confidently stated, notwithstanding the comparative absence of specific decisions, that the general principles applicable to other classes of insurance are applicable here as well. Thus, the general doctrine of warranty, representation, and concealment, as applied to fire, life, and marine insurance, is applicable also to the subject of guaranty insurance. It was held in a Canadian case that a company was liable on a policy guarantying the faithful and diligent performance of the duty of a clerk, where such clerk went to lunch, leaving a large sum of money in open bags in his room, which money disappeared while he was gone. Overdrafts allowed without security, by collusion with the party making the overdrafts, is within a policy which insures against loss 'by the want of integrity, honesty, and fidelity, or by the negligence, default, or irregularities, of the manager.'"

In Shakman v. Credit-System Co., 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920, it was held that a contract to indemnify a merchant against loss from insolvency of customers was a contract of insurance, and it was said: "We regard the contract before us as unquestionably a contract of insurance. An insurance contract is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril. The peril of loss by the insolvency of customers is just as definite and real a peril to a merchant or

manufacturer as the peril of loss by accident, fire, lightning, or tornado, and is in fact much more frequent. No reason is perceived why a contract of indemnification against this ever-present peril is not just as legitimately a contract of insurance as a contract which indemnifies against the more familiar, but less frequent, peril by fire. This very contract has been (sub silentio) construed as a policy of insurance by the supreme court of New Jersey. Robertson v. Credit-System Co., 57 N. J. Law, 12, 29 Atl. 421. The contract being, then, a contract of insurance, and the defendant's business being the making of such contracts, it follows that the defendant is an insurance corporation, within the meanings of sections 1977 and 1978, Rev. St."

In Tebbets v. Guaranty Co., 19 C. C. A. 281, 73 Fed. 95, the action was upon a policy of insurance against business losses or "uncollectible debts" issued by the defendant to the plaintiff, and it was said: "Insurance against mercantile losses is a new branch of the business of underwriting, and but few cases dealing with policies of that character have as yet found their way into the courts. The necessarily nice adjustments of the respective proportions of loss to be borne by insurer and insured, the somewhat intricate provisions which are required in order to make such business successful, and the lack of experience in formulating the stipulations to be entered into by both the parties to such a contract, have naturally tended to make the forms of policy crude and difficult of interpretation."

We do not understand counsel for petitioners to deny that under these authorities and definitions one or more of the objects stated in its application fall within the term "insurance." But it is insisted that inasmuch as the time of the passage of the general incorporation law of 1872, under which they seek to organize, there were already in existence statutory provisions for the incorporation of companies known as "insurance companies,"—that is to say, fire, inland navigation, and marine insurance companies, also life insurance companies,—and that provisions like those of the charter here sought by petitioners were practically unknown at that time, therefore the legislature did not intend, by the use of the word "insurance," other kinds of insurance than existed at that time, and named in the prior enactments. The proposition is untenable. While corporations of this character have not until recently been organized, they must, under the foregoing authorities, be treated as a form of insurance companies, and as such they fall within the express limitation named in the statute.

The language of the exception, in common acceptation, includes all insurance companies, and it is not for the court to say that only certain classes were intended. "Courts cannot, as a general rule, disregard the plain language of a statute. It is their duty to accept it as they find it, and enforce it as plainly written." Coke Co.

v. Downey, 127 Ill. 201, 20 N. E. 20, and authorities cited. "It is not the province of the judiciary to make laws, but to construe and interpret them, and pass upon their validity." Referring to authorities cited, it is further said: "A careful examination of all these cases will show that where the construction given to the words of a statute is variant from their strict and literal meaning, such construction is only justified upon the ground that it effectuates the intention of the legislature as manifestly disclosed by a consideration of the whole context." Wunderle v. Wunderle, 144 Ill. 62, 33 N. E. 195, 19 L. R. A. 84.

The manifest purpose of the legislature in excepting banking, insurance, real-estate brokerage, and other corporations from the provisions of the act authorizing the incorporation of companies for other lawful purposes, was that these excepted corporations should be restrained by more strict requirements, securing the safe conduct and correct administration of their affairs. The object stated in the petitioner's application—especially that of guarantying the performance by persons, firms, and corporations of contracts, bonds, recognizances, and undertakings of every kind—is not only to enter into contracts of insurance, within the meaning of the authorities cited, but within the spirit and reason of the exception.

We think the application of the petitioner was properly refused, and the petition for a writ of mandamus will be denied. Writ denied.

MAGRUDER, J., dissents.

CARTER, C. J. I do not agree to the conclusions reached in this case.

TRENTON PASS. R. CO. v. GUARANTORS' LIABILITY INDEMNITY CO.

(Supreme Court of New Jersey, 1897. 60 N. J. Law, 246, 37 Atl. 609, 44 L. R. A. 213.)

Action by the Trenton Passenger Railroad Company against the Guarantors' Liability Indemnity Company. Case reserved. Judgment for plaintiff.

The declaration in this case is founded upon a written contract, whereby the Guarantors' Liability Indemnity Company indemnifies the Trenton Passenger Railroad Company against legal liability for injury to or death of persons arising by reason of casualty occurring in, upon, about, or by reason of the street railroad of the Trenton Passenger Railroad Company or its equipment, to an amount not exceeding $5,000, for the injury to or death of any one employé, not to exceed $5,000 for the injury to or death of any person other than an employé, and not to exceed $20,000 in respect

to any one casualty whereby several may be injured or killed. It further sets out various actions against the Trenton Passenger Railroad Company for injuries which it claims fell within the contract of indemnity of the Guarantors' Liability Indemnity Company, and that those actions had been prosecuted to judgment, but that the Guarantors' Liability Indemnity Company, although requested, had not paid them in accordance with the terms of their contract. The plea was the general issue.

The issue joined was tried by the court, a jury being waived. The trial judge found that the Guarantors' Liability Indemnity Company had made the contract declared upon, and that, while such contract was in force, two judgments were obtained against the Trenton Passenger Railroad Company for casualties and injuries falling within the terms of that contract, which judgments the latter company had paid. Thereupon the trial judge reserved for the determination of the supreme court the following question of law, namely: Whether the said contract of indemnity is a valid contract, or is void as against public policy, as being a contract to indemnify the said the Trenton Passenger Railroad Company, Consolidated, against losses resulting from its negligence, or from the negligence of its agents and employés.

Argued February term, 1897, before Magie, C. J., and Depue, Van Syckel, and Lippincott, JJ.

Magie, C. J. (after stating the facts). The question reserved in this case is one of great interest, and is presented for determination for the first time in this court. The proof of the execution by the defendant company of the instrument on which the action is brought, which instrument contains plain stipulations for indemnifying the plaintiff company for losses arising from injuries done by it to its employés or the passengers carried by it, and the proof that such losses had occurred as were thus intended to be indemnified against, sufficiently established plaintiff's right to recover the stipulated indemnity, unless the instrument is not, in the eye of the law, a valid contract. It is obvious that the trial judge entertained doubts of the validity of the instrument in question, for, although no objection appears to have been made on the part of the defendant upon that point, he has deemed it necessary to submit it for determination to the full bench. The attitude of the defendant at the trial has been maintained in this court, for its counsel has presented no argument and made no claim that the instrument is not a binding and enforceable contract. The result is that our examination of the question has not been aided by the researches of counsel maintaining its negative, but only of counsel supporting its affirmative. For this reason, I have given the question as close an examination as time would permit, lest something bearing thereon might be overlooked.

The proposition which one would assert who contested the validi-

ty of such a contract would obviously be this, namely: that a contract whereby a common carrier of passengers is to be indemnified against damages which he was required to pay for personal injuries occasioned by his negligence, or by the negligence of his agent, is contrary to public policy, and therefore unenforceable. It is admittedly difficult, if not impossible, to formulate a satisfactory statement of what is meant by the words "public policy." Mr. Justice Kekewich declared that it does not admit of definition, and cannot be easily explained. Davies v. Davies, 36 Ch. Div. 359.

That the law has recognized one sort of public policy as a foundation for its judgment at one period, and another sort at another period, is undoubted. It is amusingly shown by Lord St. Leonards in Egerton v. Brownlow, 4 H. L. Cas. 1. Speaking of a case from the Year Books, he says (on page 238): "It was on an obligation with a condition that, if a man did not exercise his craft of a dyer within a certain town—that is, where he carried on his business—for six months, then the obligation was to be void, and it was averred that he had used his art there within the time limited, upon which Mr. Justice Hull, being uncommonly angry at such a violation of all law said, according to the book: 'Per Dieu, if he were here, to prison he should go until he made fine to the king, because he had dared to restrain the liberty of a subject.' Angry as the learned judge was at that infraction of the law, what has been the result of that very rule without any statute intervening? That the 'common law,' as it is called, has adapted itself upon grounds of public policy to a totally different and limited rule that would guide us at this day, and the condition that was then so strongly denounced is just as good a condition now as any that was ever inserted in a contract, because a partial restraint created in that way with a particular object is now perfectly legal."

Another illustration occurs with respect to the obligations imposed by law founded on public policy, on common carriers of goods. Originally, they were insurers of the safety of the goods against every loss, except such as occurred by the act of God or the public enemy, and any contract relieving them of any part of that obligation was held to be void. Gradually they have been permitted to contract for exemption from some of their liability, and public policy seems now effective only to the extent of prohibiting their exemption by contract from any losses occurring by reason of their negligence and the negligence of their servants. For such losses the law founded on public policy still holds them bound. Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788.

From these varying applications of the principle called "public policy," I think it obvious that no accurate definition of that phrase can be devised in respect to any particular matter. In my

judgment, the best that can be done is to say that, since the law abhors conduct injurious to the public interest or antagonistic to the public good, the courts will decline to enforce contracts which, at the time they are presented for consideration, require or involve conduct against public interest and public good. Such is the result of my consideration of the matter after examining many cases which exhibit the variant views taken by courts upon this subject, which variance is no more strikingly indicated than in the case of Egerton v. Brownlow, before cited.

My researches have not been rewarded with the discovery of many expressions of judicial opinion or by many adjudications on the question reserved in this case. Obvious reasons exist why the judicial consideration of such a question would be infrequent. In actions upon contracts of indemnity, such as that on which this action is founded, the insured raises no question as to the validity of the contract. The insurer, if, as usually it is, a company engaged in seeking profit by making such contracts of insurance, is equally adverse to setting up or maintaining that the contracts by which its profits are made are, in the eye of the law, void.

Adjudications and judicial opinions upon a class of contracts which seem to me to bear a strict analogy to those contracts, one of which is before us, are not infrequent. As before stated, common carriers of goods may, by contract with their employers, limit their liability for losses from all peril except those arising from their negligence or the negligence of their servants. When the liability is so limited, the common carrier of goods stands answerable only for his negligence, and that of his servants. The common carrier of passengers has never been deemed an insurer of their safety during carriage, but the law has imposed upon him a duty to take the highest care for the safety of the passengers. He is therefore liable for injuries done to the passengers only where they result from his negligence; that is, the failure to take the care for the safety of the passengers which the law enjoins. Both classes of carriers are therefore liable under such circumstances upon precisely the same grounds. Their liability arises from negligence which is a failure to bestow the care and skill which the situation of the parties and the subject-matter require. The negligence which will render them respectively liable may possibly differ in degree, although the distinction between what has been called gross negligence and ordinary negligence is now generally and with great reason repudiated. Railroad Co. v. Lockwood, supra. It is identical in kind.

The only reason which I find possible to conceive to be capable of being urged in support of the proposition that the contract before us in this cause is contrary to public policy is that the indemnity thereby provided for a common carrier of passengers may tend to render him less careful in the performance of his duty to his passengers than he otherwise would be. It is obvious that such

is not the purpose of the contract for indemnity. The insurer does not contemplate the relaxation of the carrier's vigilance, which would tend to throw additional liability upon him. The insured is held to the performance of his duty of vigilance both by his liability notwithstanding the indemnity, and by the fact that the vigilant carrier would obtain better terms in making the contracts of insurance. It is further obvious that, if a contract indemnifying the common carrier of passengers against liability arising from his negligence tends to a relaxation of vigilance inimical to the public interest, so a contract indemnifying a common carrier of goods against the consequences of his negligence must have the same effect, and be obnoxious to the rule avoiding contracts contrary to public policy. Yet it now seems well settled that a common carrier of goods may enforce contracts of insurance on goods carried against all losses other than those occasioned by his negligence or the negligence of his servants.

In an action upon such a contract of insurance which came before the supreme court of the United States, Mr. Justice Gray thus dealt with the claim that such contracts were void. He said: "No rule of law or of public policy is violated by allowing the common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants. By obtaining insurance, he does not diminish his own responsibility to the owners of the goods, but rather increases his means of meeting that responsibility. If it were true that a shipowner, obtaining insurance by general description upon his ship and the goods carried by her, could, in case of the loss of both ship and goods by perils insured against, and through the negligence of the master and crew, recover of the insurers for the loss of the ship only, and not for the loss of the goods, some trace of the distinction would be found in the books; but the learning and research of counsel have failed to furnish any such precedent." Phœnix Ins. Co. v. Erie & W. Transp. Co., 117 U. S. 312, 6 Sup. Ct. 1176, 29 L. Ed. 873.

The doctrine in that case was referred to with approval in Insurance Co. v. Adams, 123 U. S. 67, 8 Sup. Ct. 68, 31 L. Ed. 63, and Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788. Afterwards the court was urged to review the doctrine of Mr. Justice Gray, and to declare that the insurance was an insurance against negligence, and contrary to public policy, and void; but the court, speaking by Mr. Justice Blatchford, reaffirmed the doctrine, on the grounds stated in the opinion of Mr. Justice Gray. California Ins. Co. v. Union Compress Co., 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730.

Various kinds of insurance against loss by fire or loss by perils

of the sea would seem to be open to a like charge of a tendency to encourage negligence, which, at least when the policies are held (as they so frequently are) as collateral security for obligations of the insured, may be well argued to be against the public interest, and therefore void as against public policy. But no trace of any such claim can be found in text-books or adjudications. With respect to such contracts of insurance as that with which we are dealing, I have found but two expressions of judicial opinion in the books and reports. In the case of Delancy v. Robson, 5 Taunt. 605, upon a motion to settle the venue, it incidentally appeared that the action as upon a contract of somewhat such character, and the reporter states a quære as to whether an insurance against damages that a shipowner might be liable to pay in consequence of his ship running down another be not illegal; and it is said per curiam: "It would be an illegal insurance to insure against what might be the consequence of the wrongful acts of the accused." This case affords no aid in the solution of the question, both because the question was not directly presented, but only incidentally considered, and because what the court said may well be deemed limited to acts of the insured which were actively wrongful in distinction from being merely negligent.

There is, however, an adjudication precisely in point in which the question thus arose: An incorporated company, authorized, among other things, to issue contracts of indemnity of the same character as that before us, became insolvent. Its business had not been confined to making such contracts, but had extended to other contracts of indemnity; and the court, in distributing the assets, had before it creditors whose claims arose from other forms of contracts than those arising upon such contracts of insurance. In behalf of the other creditors, the court was urged to declare that the creditors who claimed upon such contracts of insurance should not be admitted to partake in the distribution of the assets, upon the ground that such contracts of insurance were obnoxious to public policy, and unenforceable and void. The opinion of the court was written by Chief Justice McSherry, and contains an admirable discussion of the question, reaching the conclusion that public policy does not avoid these contracts. In respect to the claim that the possession of such indemnity tends to beget negligence, he says: "Nor can we assume as an unvarying rule, of which judicial notice will be taken, that a carrier of passengers, who has secured an indemnity to reimburse himself for losses which his own negligence may produce, will, merely because and solely in consequence of having such indemnity (which, at best, is but limited and partial), necessarily disregard the duty to exercise the highest degree of care. And, unless it be assumed as a postulate that the mere possession of an indemnity will of itself necessarily and invariably produce negligence, it does not logically follow that such a policy

or indemnity is even incidentally or indirectly repugnant to public policy. The indemnity in no way affects the liability of the carrier to the person injured. The utmost that it does, precisely as in the case of a carrier of goods, is to afford him a fund out of which he may be reimbursed, and that, too, perhaps, but partially; for in all these policies the liability of the insured is always limited and confined to a specifically designated sum." Boston & A. R. Co. v. Mercantile Trust & Deposit Co., 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97.

The result is that the reserved question must be answered in favor of the validity of the contract upon which this action is founded, and, as the special finding of the trial judge shows that he had assessed the damages of the plaintiff at the sum of $978.36, judgment should be ordered for the plaintiff for that sum. It is proper to observe that the decisions of this court in Kinney v. Railroad Co., 32 N. J. Law, 407, 90 Am. Dec. 675, and of the court of errors in the same case (34 N. J. Law, 513, 3 Am. Rep. 265), are not at all antagonistic to the views above expressed. It was held in both courts that, when a common carrier of passengers agreed to carry a passenger gratuitously, a valid contract might be made between the carrier and such a passenger, exempting the carrier from all liability even for injuries resulting from its negligence or the negligence of its servants. But this was distinctly put upon the ground that in such case the ordinary relation of a passenger and common carrier did not arise, but rather a relation (as the learned chief justice pointed out) analogous to that of a bailor and a gratuitous bailee. Assuming that it may be inferred from those decisions that, when the ordinary relation of common carrier and passenger has arisen, a contract exempting the former from liability to the latter for injuries resulting from its negligence or the negligence of its servants would be invalid, it only results that the common carrier of passengers is left invariably liable for the consequences of its negligence, precisely as is above shown the common carrier of goods is liable.[10]

[10] See, in accord, Casualty Ins. Company's Case, 82 Md. 535, 574, 34 Atl. 778, 38 L. R. A. 97 (1896). But statutes declaring that no contract of insurance or indemnity made between a railway and its employés shall constitute a defense in an action by an employé for personal injury have been held constitutional. See McGuire v. C. B. & Q. Ry. Co., 131 Iowa, 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706 (1906), affirmed 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328 (1911).

COMMONWEALTH v. WETHERBEE.

(Supreme Judicial Court of Massachusetts, 1870. 105 Mass. 149.) [11]

Indictment on the St. of 1867, c. 267, § 5, for acting in the transaction of the business of insurance as agent of an insurance company not incorporated in this commonwealth, without first procuring from the insurance commissioner a certificate of authority so to do.

The defendant admitted in the trial in the superior court, before Dewey, J., that he had solicited persons in Massachusetts to become members of the Connecticut Mutual Benefit Company, without having obtained authority from the insurance commissioner to do so; but he claimed that it was not an insurance company under the statutes of Massachusetts, but rather an organization for the mutual benefit of its members, not conducted for profit, but only for benevolent purposes. But the court ruled that the association was an insurance company under the statute of Massachusetts, and the jury returned a verdict of guilty. The defendant alleged exceptions.

Gray, J. A contract of insurance is an agreement, by which one party, for a consideration, (which is usually paid in money, either in one sum, or at different times during the continuance of the risk,) promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest. In fire insurance and marine insurance, the thing insured is property; in life or accident insurance, it is the life or health of a person. In either case, neither the times and amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer, affect the question whether the agreement between them is a contract of insurance. All that is requisite to constitute such a contract is the payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract.

The contract made between the Connecticut Mutual Benefit Company and each of its members, by the certificates of membership issued according to its charter, does not differ in any essential particular of form or substance from an ordinary policy of mutual life insurance. The subject insured is the life of the member. The risk insured is death from any cause not excepted in the terms of the contract. The assured pays a sum fixed by the directors and not exceeding ten dollars, at the inception of the con-

[11] The statement of facts is much abbreviated. The constitution and by-laws of the Connecticut Mutual Benefit Company are set forth in the original report.

tract, and assessments of two dollars each annually, and of one dollar each upon the death of any member of the division to which he belongs, during the continuance of the risk. In case of the death of the assured by a peril insured against, the company absolutely promises to pay to his representatives, in sixty days after receiving satisfactory notice and proof of his death, "as many dollars as there are members in" the same division, the number of which is limited to five thousand. The payment of this sum is subject to no contingency but the insolvency of the corporation. The means of paying it are derived from the assessments collected upon his death from other members; from the money received upon issuing other certificates of membership, which the by-laws declare may, after payment of expenses, be "used to cover losses caused by the delinquencies of members"; and from the guaranty fund of a hundred thousand dollars, established by the corporation under its charter.

This is not the less a contract of mutual insurance upon the life of the assured, because the amount to be paid by the corporation is not a gross sum, but a sum graduated by the number of members holding similar contracts; nor because a portion of the premiums is to be paid upon the uncertain periods of the deaths of such members; nor because, in case of nonpayment of assessments by any member, the contract provides no means of enforcing payment thereof, but merely declares the contract to be at an end, and all moneys previously paid by the assured, and all dividends and credits accrued to him, to be forfeited to the company.

The fact, offered to be proved by the defendant, that the object of the organization was benevolent and not speculative, has no bearing upon the nature and effect of the business conducted and the contracts made by the corporation.

The ruling that this association was an insurance company, within the meaning of the statute upon which the defendant was indicted, was therefore correct, and his

Exceptions must be overruled.[12]

[12] While mutual, benevolent, and fraternal associations are almost universally held to be insurance companies, yet as a rule they are excepted from the general statutory regulations governing the operation of general insurance companies, and made subject to statutory provisions especially adapted to their peculiar character. See, for example, Gen. St. Minn. 1913, §§ 3537–3590; Brown v. Balfour, 46 Minn. 68, 48 N. W. 604, 12 L. R. A. 373 (1891); A. L. of H. v. Larmour, 81 Tex. 71, 16 S. W. 633 (1891); State v. Benton, 35 Neb. 463, 53 N. W. 567 (1892).

It has been held that insurance applied for or obtained from a mutual, benevolent, or fraternal association is not "other insurance" within the terms of the ordinary life policy. See Penn Mutual Life Ins. Co. v. Mechanics' Savings Bank & Trust Co., 37 U. S. App. 692, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33 (1896); Equitable Life Ins. Co. v. Hazelwood, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893 (1889). See contra, Clapp v. Mass. Ben. Ass'n, 146 Mass. 519, 16 N. E. 433 (1888); McCollum v. Mutual Life Ins. Co., 55 Hun, 103, 8 N. Y. Supp. 249 (1889). Numerous authorities are collected in the note found in 38 L. R. A. 33.

DANE v. MORTGAGE INSURANCE CORPORATION, LIMITED.

(Court of Appeal. [1894] 1 Q. B. Div. 154.)[13]

Appeal from an order of the Divisional Court directing judgment to be rendered for the plaintiff.

The plaintiff, having deposited £1000. for a period of three years at four and a quarter per cent. per annum interest with the Bank of Australia, secured from the defendant corporation a contract whereby the plaintiff was "guaranteed" the payment of the principal sum and interest by the corporation in case of default by the bank, subject to certain conditions that need not be here set forth.

The principal sum became due on April 19, 1893, and the bank made default in payment thereof. Subsequently to the date of such default, the bank suspended payment, and an order to wind up the bank was made in Victoria, by the Supreme Court of that colony.

By a scheme of compromise or arrangement between the bank and its creditors, which was sanctioned by the colonial court, the old company was to be wound up, and a new company formed. By the terms of this sanctioned arrangement, deposit receipts and shares of the new company were to be received in full discharge of the old company's similar obligations, which were to be surrendered and cancelled.

The plaintiff gave the defendants notice of the default in payment of the principal sum, and then brought the present action to recover that sum and £18. interest.

Moulton, Q. C., and Danckwerts, for the defendants. The contract here was one of guarantee and not of indemnity. The contract itself uses the expression "guarantee to the assured payment," and such a guarantee does not amount to an insurance against risk; it is a guarantee of a debt of a third person within the Statute of Frauds. If this is a contract of guarantee, the law applicable to sureties being discharged, by reason of the position of the parties being altered, becomes applicable. Here the defendants were discharged from liability under their contract by reason of the plaintiff having accepted the provisions of the scheme of arrangement in the winding-up proceedings. The acceptance by the plaintiff of the provisions in the scheme amounted to an accord and satisfaction of the original debt of the bank. Megrath v. Gray, L. R. 9 C. P. 216; Slater v. Jones, L. R. 8 Ex. 136. By the scheme the new company was to take over all the assets and liabilities of the old company, and the original debt was extinguished.

[13] The abbreviated statement of facts and of the argument of counsel is taken from the report in 63 L. J. Q. B. 144. The concurring opinion of Kay, L. J., is omitted.

Channell, Q. C. (with him A. J. Walter), for the plaintiff.

Lord ESHER, M. R. In my opinion the questions into which the counsel for the defendants have endeavored to lead us with regard to the law of bankruptcy and the law of guarantees have nothing to do with this case, and I decline to go into them. I do not think this contract is to be looked at as one of a guarantee in the usual sense of the term, but as a contract of insurance. The defendants are incorporated as the Mortgage Insurance Corporation, Limited, for the express purpose of insuring mortgages and other securities, and they issue policies. The contract now in question begins with the words, "This policy of insurance." It seems to me clear that the intention was that this contract should be one of insurance, and that those who entered into it with the plaintiff should be in the position of underwriters. An underwriter is not a surety. He is a person who undertakes to pay money in a certain event. The form of a policy is not that of a guarantee. A policy on a ship, for instance, is not an undertaking to pay the amount insured, if somebody else, e. g., the owner of another ship that has caused the loss, does not, but to pay such amount on the loss of the ship. Here the policy recites that the plaintiff is the holder of a deposit receipt for £1000. of the Commercial Bank of Australia, and is desirous of being "insured" as thereinafter appearing, and the defendants thereby in effect promise to pay the "assured" the principal sum, if the debtors have made default in so doing.

What the defendants have done, as it appears to me, is to insure payment of the deposit receipt according to the contract made between the depositor and the bank, i. e., that the bank will pay the amount at the date fixed by that contract for payment. The policy is not a guarantee that the bank will be able to pay; it is a positive direct contract that, if the bank does not pay a certain amount on a fixed day, the insurance company will pay that amount. By the law of insurance, though the underwriter directly promises to pay on a certain event, the contract is treated as one of indemnity; and it follows that, if the assured, who has been indemnified by the underwriters as on a total loss, saves anything upon the loss, that salvage must go to the underwriter; otherwise the assured would be more than indemnified. That is an incident of every kind of insurance which is held by law to be a contract of indemnity. Therefore, in such a case, if the assured does obtain anything by way of salvage out of the subject-matter insured, he must account for that to the underwriter; and, further than that, if anything is obtainable by way of salvage, he has no right to say to the underwriter that he will not take any step in order to obtain such salvage; he is bound to assist the underwriter in obtaining it.

For instance, in the present case, if the bank had not failed, but had remained in perfect credit, and it had on some untenable ground refused to pay the plaintiff at the time when, according to the deposit note, payment was due, the plaintiff would not be bound first to sue the bank; the policy is made for the very purpose among others of preserving her from that necessity; she would be entitled to receive payment from the defendants, the insurers; but then, if, after they had paid her, the bank, discovering their mistake, were to pay her the amount of the deposit, she would be bound to account for it to the defendants; or, on the other hand, if the bank still refused to pay, she would be bound to allow the defendants to sue in her name. All that is well-understood law with regard to insurance. I think that it is only bewildering to look away from the plain terms of this contract and add to it, as suggested by the counsel for the defendants, other words qualifying the words actually used by reference to the alleged law of the colony as to schemes of arrangement by companies with their creditors.

It is quite immaterial to the plaintiff whether there was any scheme of arrangement or not. Nothing is material, so far as she is concerned, after the fact that, the day of payment according to the contract between her and the bank having arrived, she was not paid. If after that by any law anything can be got from the bank, it is for the insurers to get it, the plaintiff being bound to put no difficulties in their way. It seems to me that this is a simple case of insurance, and that no plausible suggestion of any defence to this action has been made out. If the conclusion to which I have come wanted any confirmation, I think it would be found on reference being made to condition No. 2 indorsed on the policy; but I should come to precisely the same conclusion in the absence of that condition.

For these reasons I think that this appeal must be dismissed. Appeal dismissed.[14]

[14] Insurance Contracts in the Form of Surety Bonds.—By the great weight of authority it is held that contracts wherein the parties intend to insure against loss by reason of default of employés, debtors, or other persons shall be construed as insurance contracts, even though they may be in the form of surety bonds. As said by Start, C. J., in Hormel v. American Bonding Co., 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513 (1910): "In considering the question whether the surety company was entitled to a directed verdict for any of the reasons here urged, we must keep in view the character of contracts of suretyship of corporations organized for the purpose of engaging, for profit, in the business of guaranteeing the fidelity or contracts of a third party, and the rules of construction applicable to their contracts. While such contracts in form resemble those of suretyship, they are in effect contracts of insurance, to which the rules of construction peculiar to contracts of suretyship proper do not apply, but to which the rules governing ordinary insurance contracts are applicable. 32 Cyc. 307. 27 Am. & Eng. Enc. (2d. Ed.) 452, §§ 174, 179, and 208; Lakeside Land Co. v. Empire State Surety

GOULD v. BROCK et al.

(Supreme Court of Pennsylvania, 1908. 221 Pa. 38, 69 Atl. 1122.)

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Claude C. Gould against John W. Brock and the Travelers' Insurance Company of Hartford. From a decree sustaining a demurrer to the bill, plaintiff appeals. Affirmed.

The bill averred as follows: One of defendants, John W. Brock, is executor of Robert C. H. Brock. The other defendant, the Travelers' Insurance Company of Hartford, is a Connecticut corporation. The plaintiff, Claude C. Gould, sued said Brock, executor, at law to recover damages for personal injuries negligently and unlawfully inflicted upon plaintiff by the deceased Brock, in the running of an automobile, which suit is pending. Thereupon the said foreign corporation, not being of kin to the said Brock, and not sustaining any relation to him or to his estate, or to the plaintiff lawfully entitling it to interfere and intermeddle in the said common-law action, has nevertheless, for hire paid to it by said Brock, undertaken to maintain and conduct the defense against the said action, at its own cost, and according to its sole discretion, and without any expense for costs or reference whatsoever to the said Brock, and for the purpose of obstructing, preventing, and defeating plaintiff in his effort to enforce and obtain his just rights; and, in furtherance of its said unlawful undertaking, has caused to be entered in said common-law action an appearance and plea by its own attorney, ostensibly for said Brock, but in truth and in fact for itself, and proposes to maintain and conduct the defense in said litigation until final judgment, although the plaintiff has and can have no claim or recourse against the said corporation for the damages suffered and claimed by him in said common-law action against Brock. By means of the said unlawful contrivance between said Brock and said corporation, and the resulting interference, intermeddling, and maintenance by said corporation, the plaintiff is greatly harassed, hindered, and prejudiced in his effort to obtain and enforce his just rights, to his irreparable injury and contrary to law and equity.

The bill prayed for an injunction: (1) Restraining said corporation from intermeddling in the action at law aforesaid. (2) Requiring it to withdraw the said appearance and plea. (3) Restraining Brock from receiving assistance from said corporation. (4) General relief. A demurrer to the bill was sustained by the court.

Co., 105 Minn. 213, 117 N. W. 431 (1908); Brandup v. Same, 111 Minn. 376, 127 N. W. 424 (1910)." See note in 24 Harv. Law Rev. 568.

An excellent discussion of the distinction between contracts of suretyship and insurance is also found in Cowles v. Fidelity & Guaranty Co., 32 Wash. 120, 72 Pac. 1032, 98 Am. St. Rep. 838 (1903). In an extensive note in 33 L. R. A. (N. S.) 513, will be found a full collection of authorities on this point. See, also, Parr's Bank v. Albert Mines Syndicate, 5 Com. Cas. 116 (1899).

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

PER CURIAM. No cause of action is alleged in the bill which in any view of it can sustain the interference of a court of equity. If there are any available merits in complainant's case, they are maintainable at law. But there is no ground either at law or in equity. The right of a party sued to avail himself of all proper means of defense, not only by the professional assistance of counsel, but also by expert and other testimony, the experience of persons familiar with the business, etc., and the further right to protect himself by insurance from an adverse result of uncertain litigation, are beyond question. There was a time when all insurance, and especially of life, was looked upon with suspicion and disfavor, but it was only because regarded as a species of wagering contract. That time has long gone by. And, with the intelligent study of political economy bringing the recognition of the fact that even the most apparently disconnected and sporadic occurrences are subject to at least an approximate law of averages, the insurance against loss from any such occurrence has been recognized as a legitimate subject of protection to the individual by a guaranty of indemnity from some party undertaking to distribute and divide the loss among a number of others for a premium giving them a prospect of profit.

There is nothing in this case that even remotely discloses the taint of maintenance, even at common law, much less of the principle of maintenance as administered at the present day with a clearly defined limitation to cases of actually malicious, dangerous, or illegal intermeddling with other parties' litigation. Fenn v. McCarrell, 208 Pa. 615, 57 Atl. 1108; Frankfort Marine, etc., Ins. Co. v. Witty, 208 Pa. 569, 57 Atl. 990; Dives v. Fidelity & Casualty Co., 206 Pa. 199, 55 Atl. 950; Phillipsburg Horse Car Co. v. Fidelity & Casualty Co., 160 Pa. 350, 28 Atl. 823.

Decree affirmed.

STATE v. WILLETT.

(Supreme Court of Indiana, 1908. 171 Ind. 296, 86 N. E. 68, 23 L. R. A. [N. S.] 197.) [15]

Appeal from Circuit Court, Hancock County; R. L. Mason, Judge.

Matt Willett was charged with writing a policy of insurance in violation of Burns' Ann. St. 1908, § 4713. A motion to quash the indictment was sustained, and the State appeals. Reversed and remanded, with instructions to overrule the motion.

HADLEY, J. The prosecuting attorney filed an affidavit charging

[15] The statement of facts as given in the opinion of the court is much abbreviated, and a part of the opinion dealing with insurable interest is omitted.

appellee with writing a policy of insurance in violation of section 4713, Burns' Ann. St. 1908 (section 4894u1, Burns' Ann. St. 1901). Appellee's motion to quash the affidavit was sustained, and the state appeals.

The first count of the affidavit stated, in substance, that the appellee, on the 10th day of December, 1907, knowingly and unlawfully wrote a policy of insurance upon the life of one Davis, who was then and there an individual in the state of Indiana; the policy reading as follows: "No. 8539. Greenfield, Ind., Dec. 10, 1907. This is to certify that Charles C. Davis, who was born on the 1st day of July, 1867, is entitled to membership in the Greenfield Mutual Burial Association, and entitled to all the benefits as a member of said association, in accordance with the by-laws thereof. M. T. Smith, President. Attest: Oak S. Morrison, Secretary." The affidavit then sets out the by-laws of the Greenfield Mutual Burial Association, which state [the rules governing admission to membership in the society, the regulations for the payment of assessments, and defining the benefits to be derived from membership].

Articles 14 and 15 are in these words: "The benefits herein provided are for the purpose of furnishing respectable funeral and burial services for deceased members, and the benefits provided are to be paid to the undertaker furnishing such services, and not to surviving relatives and friends as death benefits. It is agreed that the goods for said funerals shall be furnished and services rendered by C. W. Morrison & Son, their heirs and assigns, and they are hereby designated the official undertakers of this association." * * *

The affidavit further charged that neither the beneficiary named in said policy of insurance, nor any member of the firm of C. W. Morrison & Son, had any bona fide insurable interest, in whole or in part, in the life of said Charles C. Davis, at the time said policy was issued, nor at said time was the beneficiary of such policy, nor was any member of the firm of C. W. Morrison & Son, related to said Charles C. Davis in any degree of kinship whatever.

The statute referred to at the head of this opinion forbids the taking, or the receiving, of any application for any insurance upon the life of any person in the state of Indiana, in favor of any person who has not a bona fide insurable interest in the life of the insured, or who is not related to him within a degree not further removed than first cousins. It also forbids the issuance of a policy of insurance where the insured has not been subjected to, and satisfactorily passed, a medical examination by a duly authorized physician. The offenses created by this statute relate to the character of the interest, or relationship, of beneficiaries in contracts of insurance, and the state of the health of the insured. The first question therefore to be determined is whether the Greenfield Mutual Burial Association, as shown by its by-laws and certificates of membership, is engaged in doing a life insurance business; or, in other words, whether their "certifi-

cates," such as was issued in this case, are, in legal contemplation, insurance contracts upon the life of persons named.

There are three kinds of insurance companies—stock, mutual, and mixed. A "stock company" is one where the stockholders contribute all the capital, pay all the losses, and take all the profits. A "mutual company" is one wherein the members constitute both the insurers and the insured, where the members all contribute, by a system of assessments, to the creation of a fund from which all losses and liabilities are paid, and wherein the profits are divided among themselves in proportion to their interests. "Mixed companies" are such as the term implies. They embody the characteristics of both the others. The subjects of insurance are numberless. The various systems, with their ramifications, offer indemnity for almost every conceivable loss, or injury, that may be sustained, and which depends upon future possibility, or uncertainty, in point of time. It embraces the hazards of navigation, losses by fire, lightning, tornadoes, accidents of almost every character, insolvency of debtors, dishonesty and negligence of employés, failure of title to real estate, death of animals and of human beings. In life insurance, the event insured against is sure to happen, and at some time the indemnity promised the beneficiary is sure to ever phrased, would be an indemnity contract.

But the contracts made by all kinds of insurance companies are plain indemnity contracts; contracts by which one party agrees, for a stipulated sum, to assume some risk borne by the other party, and, if the apprehended loss occurs, to make the loser whole by reimbursing him fully, or to the extent agreed upon in the contract. There is no doubt but a contract founded upon a legal consideration, whereby the obligor undertakes to furnish the obligee, or to one of the latter's near relatives, as the case may be, at death, a burial reasonably worth a fixed sum, would be a valid contract. If the citizen of small means, or for any other reason, desires to make a definite arrangement for the expenses of his funeral, and thus make certain of a sufficient amount to secure a respectable burial, the law will sustain him, if he will keep his contract within certain well-defined limitations demanded by both the statute and public policy. Such a contract, however phrased, would be an indemnity contract.

Bouvier defines an "insurance contract" to be one "whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject, by specific perils." Bouvier's L. Dic., p. 1008, "Insurance." In State v. Railroad Co., 68 Ohio St. 9, 67 N. E. 93, 64 L. R. A. 405, 96 Am. St. Rep. 635, life and accident insurance is defined to be "a contract whereby one party, for a stipulated consideration, agrees to indemnify another against injuries by accident or death." In Commonwealth v. Beneficial Ass'n, 137 Pa. 412, 18 Atl. 1112, it is said: "A contract of insurance is purely a business adventure, not founded on any philanthropy or charitable privilege; and the design and purpose of an insurance company and the domi-

nant and characteristic feature of its contract is the granting of an indemnity, or security against loss, for a stipulated consideration. The same subject is stated in Cooley's Briefs on L. of Ins. vol. 1, p. 5, thus: "Perhaps a better definition is that a contract of insurance is an agreement by which one party for a consideration promises to pay money, or its equivalent, or do some act of value to the assured, upon the destruction or injury of something, in which the other party has an interest." "To render a contract one of life insurance the payments must be contingent upon the duration of human life." 25 Cyc. 697. See, also, May on Insurance, § 112; Standard Dict. "Insurance"; People v. Rose, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124; Words & Phrases, "Insurance"; 15 Am. & Eng. Ency. p. 878.

In the light of the foregoing definitions, we again inquire: Was the contract solicited and taken of Charles C. Davis, by appellee, any kind of life insurance, within the meaning of the statute? The contract was issued by an association whose declared object is to secure, or make certain, by a system of mutual contribution, to each member of the association, at death, the specific benefit of $75 for application to his burial service. This was indemnity, or security, that at the cessation of the life of the member a certain sum of money should be payable by the association for his burial, whether the deceased had paid one assessment or a thousand. The controlling elements of the contract, as interpreted by the by-laws, are in all material respects similar to those of an ordinary mutual life insurance company. The members of the association are both the indemnitors and the indemnitees. It pays its losses from a mutually contributed fund, and divides its profits among the members. Death assessments must be paid by the contract holder during the life of the insured, and the promised indemnity is payable in a lump sum, and in a definite amount. The association needs and employs agents to represent it. It solicits from the general public. It is founded on no principle of philanthropy, benevolence, or charity. It is not a benefit and protective society, designed to furnish relief to its sick and disabled members out of funds mutually contributed for that purpose. It is simply a business enterprise in which the contract holder is promised a definite thing, in consideration of his performance of a definite undertaking on his part.

The contract is determinable by the cessation of a human life, and belongs to that extended class of agreements dependent upon such contingency, and commonly known as "life insurance." It is therefore life insurance within the meaning of section 4713, supra, and subject to the wholesome provisions of our insurance laws. State v. Wichita Mutual Burial Association, 73 Kan. 179, 84 Pac. 757; Fikes v. State, 87 Miss. 251, 39 South. 783; State v. Beardsley, 88 Minn. 20, 92 N. W. 472; In re Solebury Mutual Protective Society, 4 Com. Pl. R. (Pa.) 11. The Kansas Case, supra, involved an association that had by-laws, and issued certificates of membership substantially iden-

tical with those under consideration; and, concerning the purposes of the association, that court said: "The business designed to be transacted under the plan of the Wichita Mutual Burial Association is plain ordinary insurance." In the case before us, some of the details of the plan, as outlined by the by-laws, are veiled, and give evidence of an effort to avoid the classification just made. Some of the provisions are unreasonable, some unguarded, and others indefinite, and tend to expose the concern to the suspicion that the whole system is, in real design, but the scheme of an undertaker to promote his private business, largely at the expense of persons of small means. A wise public policy demands that the laws be liberally construed to circumvent any attempt, by such bodies, to evade the reasonable and beneficent restraints of the statute.

This leads us to the important inquiry: Does it appear that the beneficiary of the contract has an insurable interest in the life of the insured, Charles C. Davis?[16] * * *

The second count alleged substantially the same facts as did the first, and set out a copy of the by-laws, and then charged that, at the time said policy was written and issued, said Charles C. Davis, the person whose life was thereby insured and to whom the policy was issued, had not first passed a satisfactory medical examination by a physician duly authorized to practice medicine in the state of Indiana. This count also stated a sufficient charge under said section.

The judgment is reversed, and the cause remanded, with instructions to overrule the motion to quash the affidavit.

[16] The court proceeded to find that the firm of undertakers was the real beneficiary under the contract, and that such beneficiary had no insurable interest in the life of the insured.

Insurance is Not Commerce.—In a long series of cases, beginning with Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357 (1868), and culminating in New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 34 Sup. Ct. 167, 58 L. Ed. —— (1913), it has been held that the business of insurance is not commerce, and therefore not within the protection of the interstate commerce clause of the federal constitution. Hence any state has the power wholly to exclude any foreign insurance corporation from doing business within its borders, or to admit it upon such conditions as it sees fit to impose. Security Mut. Life Ins. Co. v. Prewitt, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013, 6 Ann. Cas. 317 (1905).

State Regulation of Insurance Rates.—That the insurance business is so affected with a public interest that it is a proper subject of state regulation has long been settled. See State v. Howard (Neb.) 147 N. W. 689 (1914). It has recently been held by the Supreme Court of the United States that the state may regulate the rates of fire insurance. German Alliance Insurance Co. v. Kansas, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. —— (1914). See note, 25 Harvard Law Rev. 372.

CHAPTER II

THE SUBJECT-MATTER OF THE CONTRACT—INSURABLE INTEREST

SECTION 1.—NECESSITY FOR THE EXISTENCE OF INSURABLE INTEREST

GODDART v. GARRETT.

(Chancery, 1692. 2 Vern. 269.)

The defendant had lent money on a bottom-rhea bond, but had no interest in the ship or cargo, the money let was £300. and he insured £450. on the ship; the plaintiff's bill was to have the policy delivered up, by reason the defendant was not concerned in point of interest, as to the ship or cargo.

Cur. Take it that the law is settled, that if a man has no interest, and insures, the insurance is void, although it be expressed in the policy interested or not interested, and the reason the law goes upon, is that these insurances are made for the encouragement of trade, and not that persons unconcerned in trade, nor interested in the ship, should profit by it; and where one would have benefit of the insurance, he must renounce all interest in the ship. And the reason why the law allows that a man having some interest in the ship or cargo, may insure more, or five times as much, is that a merchant cannot tell how much, or how little, his factor may have in readiness to lade on board his ship. And it was said, that the usual interest allowed on bottom-rhea, was £3. per cent. per mensem, and you may insure at 6 or 7 per cent. for the voyage: So if this practice might be allowed, a man might be sure to gain £30. or more per cent.

Per Cur. Decree the policy of insurance to be delivered up to be cancelled.

Note, that in this case, notice was taken in the policy, that it was to insure money on bottom-rhea.[1]

Note, also, that in this case, the ship survived the time limited in the bottom-rhea bond, and was lost within the time limited in the policy. So if insurance good, defendant might be intitled to the money on the bond, and also on the policy.

[1] See Harman v. Van Hatton, 2 Vern. 717 (1716). In Glover v. Black, 3 Burr. 1394 (1763), it was held that insurance upon goods laden upon a vessel taken out by a lender in respondentia was void under St. 19 Geo. II, c. 37, but it would have been otherwise if the insurance had been expressly upon such bottomry or respondentia interest.

ASSIEVEDO v. CAMBRIDGE.

(Court of Queen's Bench, 1712. 10 Mod. 77.)[2]

Upon a special verdict the case in substance appeared to be this:

Assievedo had insured so much money upon a ship called The Ruth, for such a voyage, in which ship Assievedo is found by the verdict not to be at all concerned, in point of interest. It happened that this ship was taken by the enemy, and kept in their possession for nine days, and then, before it was carried infra præsidia, viz. a place of safety, it was retaken by an English man of war.[3]

The question was, Whether or no this was such a taking as should enable the plaintiff to recover the sum insured against Cambridge?

Dr. Floyer, for the plaintiff, argued that this was rather to be esteemed a wager than an insurance; a spei emptio et venditio, and not a versio periculi, which in the books of the civil law is looked upon as a proper definition of an insurance; that therefore whatever acts of Parliament are made about insurances must be understood of proper insurances, and not insurances of the goods of strangers; that whether or no this is such a taking as will devest the property out of the owners, is a question properly between them and the retakers; but that the question between Assievedo and Cambridge is only, Whether the ship be taken?

This case was compared to a man laying a wager that he should not be robbed in going to such a place; he is robbed, but taking some along with him pursues the robber, and recovers what he lost: here, though the money is recovered, yet the wager is lost. So if the wager had been, that such persons should not be married together; they are married, and afterwards divorced, præcontractus causa, yet the wager is lost. It was said further, that without this exposition Cambridge would have two chances, viz. that it is not taken, or that it is retaken; but Assievedo would have but one, viz. the taking.

Grotius[4] lays this down as a rule, "Placuit gentibus, ut is cepisse rem intelligatur, qui ita detinet, ut recuperandi spem probabilem alter amiserit." Now in our case the ship was for nine days together in the possession of the enemy. By the laws of Spain and France, a continuance in the possession of the enemy for twenty-four hours is an alteration of the property; and Albericus Gentilis tells us, that a per-

[2] The argument of Dr. Henchman, for the defendant, is omitted.

[3] It appears upon the special verdict in this case that "the man of war which retook the ship brought her into the port of London, and restored her to the owner upon reasonable redemption"; and therefore it is said that the question in this case could not have arisen upon the change of property, because the owner, not abandoning the ship, could only have come upon the insurers for the redemption; but that, the policy being "interest or no interest without benefit of salvage," the question was upon the terms and meaning of the wager. Per Lord Mansfield, in the case of Goss v. Withers, 2 Burr. 695 (1758).—[*Rep.*

[4] Grotius, De Jure Belli et Pacis, lib. 3, cap. 6, sect. 3.—[*Rep.*

noctation with the enemy would, by our old English law, alter the property. And Grotius, immediately after the place before mentioned, says, that "recentiori jure gentium inter Europæos populos introductum videmus, ut talia capta censeantur ubi per horas viginti quatuor in potestate hostium fuerint."

THE COURT seemed to be of opinion for the defendant. They thought, that the plaintiff's being found by the verdict to have no interest in the ship which he insured should make no difference. First. Because they never would be more favourable to an insurer non bona fide, or wagerer, than to one that insured bona fide. Secondly. Because to make a different interpretation of this deed from what is commonly put upon policies of insurance, would be to run counter to the designs of the parties, who have made use of the very same words that are used in such policies; nay, who have expressly provided for this very case, by these words, "interest or no interest;" which words signify nothing at all, unless the same loss intitles to a recovery where the insurer has no interest, and where he has. And that the property is not altered by the taking, they held to be very plain.

To be argued next term by common lawyers.[5]

SADLERS' CO. v. BADCOCK.

(High Court of Chancery, 1743. 2 Atk. 554, 26 Eng. Reprint, 733.)[6]

Ann Strode, having six years and a half to come in the lease of a house from the plaintiffs, on the 27th of April 1734 became a proprietor of the Hand-in-hand office, by insuring the sum of £400. on the house, for seven years, and on paying twelve shillings down, and three pounds some time after, the company agreed "to raise and pay out of the effects of the contribution stock, the said sum of £400. to her and her executors, administrators, and assigns, so often as the house shall be burnt down within the said term, unless the directors shall build the said house, and put it in as good plight as before the fire: and on the back of the policy it was indorsed, that if this policy should be assigned, the assignment must be entered within twenty-one days after the making thereof."

Mrs. Strode's lease expired at Midsummer 1740, the house was not burnt down till the January after 1740, and she made an assignment of the policy to the plaintiff's the 23d of February after, 1740.

[5] It does not appear from any report that a second argument was ever heard in this case. Park, Ins. 73.—[*Rep.*

[6] S. C. 1 Wils. 10.

The question is, Whether the plaintiffs, the assignees of Mrs. Strode, are intitled to the £400. insurance money, or to have the house built again; or whether the house being burnt down after Mrs. Strode's property ceased in it, the company are obliged to make good the loss, to her assignee, of the policy.

The company made an order, subsequent in time to Mrs. Strode's policy in 1738: "That whereas policies expire upon the property of the insured's ceasing, if there is no application of the insured to assign, or to have the loss made up, then the person having the property may insure the said house in the said office, notwithstanding the term for which the house was originally insured is expired."

There was evidence read for the plaintiffs, to shew that they tendered the assignment to the defendants, to enter in their books, but they refused to accept of it.

Lord Chancellor [HARDWICKE]. During the progress of this cause, while the defendants seemed to depend chiefly upon the subsequent order, I was of opinion against them.

But, upon hearing what was further offered, I think the plaintiffs are not intitled to be relieved.

There may be three questions made in this cause.

First, Whether this accident which has happened is such a loss, as obliges the defendants to make satisfaction to the plaintiffs?

Secondly, Whether, upon the terms of the original policy, the office is obliged to do it?

Thirdly, Which is rather consequential of the former, whether the plaintiffs are properly assignees of Mrs. Strode under this policy?

If this matter rested singly upon the policy itself, I should not think it such a loss, as would oblige the defendants to make satisfaction.

Under this policy, the state of the case is, Mrs. Strode was only a lessee, her time expired at Midsummer 1740, the house was burnt down the January after, within the seven years; the plaintiffs, the Sadlers company, were ground landlords, and intitled to the reversion of the term: Upon the 23d of February 1740, seven months after the expiration of the term, and one month after the fire, the assignment was made, and in consideration of five shillings only, so that it must be taken as a voluntary assignment as it stands before me.

It has been insisted, on the part of the defendants, that the plaintiffs are not intitled to recover as standing in the place of Mrs. Strode, because she had no loss or damage, her interest ceasing before the fire happened.

And this introduces the second and third questions.

I am of opinion, it is necessary the party insured, should have an interest or property at the time of the insuring, and at the time the fire happens.

It has been said for the plaintiffs, that it is in nature of a wager laid by the insurance company, and that it does not signify to whom they pay, if lost.

Now these insurances from fire have been introduced in later times, and therefore differ from insurance of ships, because there interest or no interest is almost constantly inserted, and if not inserted, you cannot recover unless you prove a property.

The insuring of ships is as old as the laws of Oleron and Rhodes whose inhabitants were the great traders of the world; look into the books that treat of insuring, and you will find the term is, aversio periculi, the intention of all insurances being to avert any damages or loss the insured might sustain: Upon this principle, in all modern insurances of ships interest or no interest is introduced, and, between the subjects of different nations, for this reason, because a great deal of contraband trade is carried on, and I believe began in the Spanish trade first.

The common law leant strongly against these policies for some time, but being found beneficial to merchants, they winked at it.

New laws have been enacted, which make it felony to destroy ships, and the temptation to it has arisen from interest and no interest inserted in policies.

No longer ago, than when I first sat in the Court of King's Bench, I have heard these insurances called fraudulent, but though inconveniences may have arisen from these words to the insurance companies, yet some inconvenience too may arise on the other side, because, if any person may insure, whether he has property or not, it may be a temptation to burn houses, to receive the benefit of the policy: By the first clause in the deed of contribution in 1696, the year this society, called the Hand-in-hand office, incorporated themselves, the society are to make satisfaction in case of any loss by fire.

To whom, or for what loss, are they to make satisfaction?

Why, to the person insured, and for the loss he may have sustained; for it cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage.

By the terms of the policy, the defendants might begin to build and repair within six days after the fire happens.

It has been truly said, this gives the society an option to pay or rebuild, and shews most manifestly they meant to insure upon the property of the insured, because nobody else can give them leave to lay even a brick, for another person might fancy a house of a different kind.

Thus it stands upon the original agreement; the next question will be, Whether the subsequent order, made by the defendants in 1738, has made any alteration?

I am of opinion it has not; for it was made only to explain a

particular case in the policy; for it might have been a question, whether Mrs. Strode could have come before the expiration of the term, to have examined the books of the office, and therefore this order was made to give her such a power.

It has been strongly objected, that the society could not make such an order.

I am very tender of saying, whether they can or not.

Because on one hand, it might be hard to say, that, as a society, they cannot make any by order for the good of the society.

And, on the other hand, it would be a dangerous thing to give them a power to make an alteration that may materially vary the interest of the insured.

The assignment is not at all within the terms of this order, because it is plain, it meant an assignment before the loss happened.

Now, with regard to the loss happening before the assignment made, Mrs. Strode was intitled to nothing but what was to be paid back upon the deposit.

It is plain she thought so, for if she had imagined she had been intitled to £400. would any friend have advised her to make a present of it to the plaintiffs?

The case of Lynch v. Dalzell, in the House of Lords, the 13th of March 1729 (4 Bro. Par. Ca. 431. S. C.), shews how strict this court and the House of Lords are in the construction of policies to avoid frauds: Lord Chancellor King was of opinion there, the plaintiff had no right to the money under the policy, because no loss had happened to him, he having no interest in the thing insured at the time of the fire, and that policies are not in the nature of them assignable, nor intended to be assigned from one person to another, without the consent of the office.

The bill here must be dismissed.

DEAN v. DICKER.

(Court of King's Bench, 1746. 2 Strange, 1250.)

This was an insurance upon goods by the Dursley galley, interest or no interest, at and from Jamaica to Bristol. In her passage she was taken by a Spanish privateer, and carried into Mores, a port in Spain, kept eight days, and then cut out by an English ship. And the plaintiff, insisting that this, though on goods, was to be considered a wager on the bottom of the ship, brought his action as upon a total loss. The defendant insisted that, by the statutes of 13 George II, c. 4, and 17 George II, c. 34, this ship is to be restored to the owners upon paying salvage, and consequently this is only an average loss; and the plaintiff can only

recover upon a total one. But the CHIEF JUSTICE [Sir WILLIAM LEE] held, that in this case the plaintiff ought to recover; for his is a wager upon a total loss on the voyage, and here has happened one; for the being carried into port and detained eight days make one. And when policy is interest or no interest, the provision of the Acts in the case of valued policies cannot take place. The act does not declare the property is not gone by such capture, but only provides for restoring the ship to whom it did, and shall be proved to have belonged. He said it might be otherwise when the re-capture was before the ship was carried intra praesidia, or in the case of goods actually on board, and upon a valued policy.[7]

STATUTES PROHIBITING WAGER POLICIES

St. 19 Geo. II, c. 37, §§ 1, 2 (1746)[8]

An act to regulate insurance on ships belonging to the subjects of Great Britain, and on merchandise or effects laden thereon.

Whereas, it hath been found by experience, that the making assurances, interest or no interest, or without proof of interest than the

[7] To the same effect is Depaba v. Ludlow, 1 Comyns, 360 (1720).

"It has been made a subject of very learned inquiry whether such (wager) policies were legal at common law. It will at present be sufficient to give what is now established as the true result of the authorities, viz.:

"1. That by the law of England, as it stood at the time of passing the Act of 19 George II, c. 37, a wager policy properly so called, i. e., one in which the parties, by express terms, such as the words 'interest or no interest,' or 'without proof of interest,' disclaimed making a contract of indemnity, was then (contrary to older determinations) deemed a valid contract of insurance.

"2. That a policy, containing no such clause disclaiming or dispensing with the proof of interest, but effected in the common form, was at common law considered to be a contract of indemnity only, upon which the assured could never recover without proof of interest." Arnould, Marine Ins. (7th Ed.) 375.

[8] REINSURANCE.—Section 4 of this act (prohibiting reinsurance) was repealed by St. 27 & 28 Vict. (1864) c. 56, § 1. The supposed policy that induced Parliament to forbid reinsurance is explained by Buller, J., in Andree v. Fletcher, 2 Term Rep. 161 (1787). See, also, Thellusson v. Fletcher, 1 Doug. 315 (1780).

"In the absence of any such usage, and of any specific stipulation in the policy, there can be no doubt that the original insurer may protect himself to the whole extent of his liability. In the words of Roccus, quoted and approved by Emerigon, by Mr. Justice Park and by Mr. Justice Livingston, 'Secundus assecurator tenetur ad solvendum omne totum quod primus assecurator solverit.' Roccus, n. 30; Emerigon, c. 8, § 14; Park, Ins. (8th Ed.) 595; Hastie v. De Peyster, 3 Caines (N. Y.) 190, 196 (1805). So Chancellor Kent says: 'After an insurance has been made, the insurer may have the entire sum he hath insured, reassured to him by some other insurer. The object of this is indemnity against his own act.' 3 Kent, Com. 278. See, also, Phœnix Ins. Co. v Erie & W. Transp. Co., 117 U. S. 312, 323 [6 Sup. Ct. 1176, 29 L. Ed. 873 (1886)]; Bradford v. Symondson, L. R. 7, Q. B. Div 456 (1881)." Insurance Co. of North America v Hibernia Ins. Co., 140 U. S. 565, 573, 11 Sup. Ct. 909, 911, 35 L. Ed. 517 (1890).

The cases on reinsurance are collected in notes in 44 L. R. A. (N. S.) 317, and 8 L. R. A. (N. S.) 844.

policy, hath been productive of many pernicious practices, whereby great numbers of ships, with their cargoes, have either been fraudulently lost and destroyed, or taken by the enemy in time of war; and such assurances have encouraged the exportation of wooll, and the carrying on of many other prohibited and clandestine trades, which by means of such assurances have been concealed, and the parties concerned secured from loss, as well to the diminuation of the publick revenue, as to the great detriment of fair traders: and by introducing a mischievous kind of gaming or wagering, under the pretence of assuring the risque on shipping, and fair trade, the institution and laudable design of making assurances, hath been perverted; and that which was intended for the encouragement of trade, and navigation, has in many instances been hurtful of, and destructive to the same: for remedy whereof, be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this parliament assembled, and by the authority of the same, That from and after the first day of August, one thousand seven hundred and forty-six, no assurance or assurances shall be made by any person or persons, bodies politick or corporate, on any ship or ships, goods, merchandizes, or effects, laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer; and that every such assurance shall be null and void to all intents and purposes.[9]

II. Provided always, and be it further enacted by the authority aforesaid, That assurance on private ships of war, fitted out by any of his Majesty's subjects, solely to cruize against his Majesty's enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the assurer; anything herein contained to the contrary thereof in any wise notwithstanding.

St. 14 Geo. III, c. 48 (1774)

An act for regulating insurance upon lives, and for prohibiting all such insurances, except in cases where the persons insuring shall have an interest in the life or death of the persons insured.

Whereas it hath been found by experience, that the making insurances on lives, or other events, wherein the assured shall have no interest, hath introduced a mischievous kind of gaming: For remedy whereof, be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords, spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the passing of this act, no insurance

[9] Wager policies are likewise prohibited on the Continent. See 1 Phillips, Ins. (3d Ed.) 4 (note), where the continental authorities are given.

shall be made by any person or persons, bodies politick or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made, contrary to the true intent and meaning hereof, shall be null and void, to all intents and purposes whatsoever.

II. And be it further enacted, That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons, name or names interested therein, or for whose use, benefit or on whose account, such policy is so made or underwrote.

III. And be it further enacted, That in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events.

IV. Provided always, That nothing herein contained shall extend, or be construed to extend, to insurances bona fide made by any person or persons, on ships, goods or merchandizes; but every such insurance shall be valid and effectual in the law, as if this act had not been made.

St. 6 Edward VII, c. 41, § 4

MARINE INSURANCE ACT, 1906

4. (1) Every contract of marine insurance by way of gaming or wagering is void.

(2) A contract of marine insurance is deemed to be a gaming or wagering contract—

(a) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

(b) Where the policy is made "Interest or no interest," or "Without further proof of interest than the policy itself," or "Without benefit of salvage to the insurer," or subject to any other like term:

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.

9 Edward VII, c. 12, § 1 (1) and (5) (1909)

MARINE INSURANCE (GAMBLING POLICIES) ACT, 1909

1. (1) If—

(a) Any person effects a contract of marine insurance without having any bona fide interest, direct or indirect, either in the safe arrival of the ship in relation to which the contract is made or in the safety

or preservation of the subject-matter insured, or a bona fide expectation of acquiring such an interest; or

(b) Any person in the employment of the owner of a ship, not being a part owner of the ship, effects a contract of marine insurance in relation to the ship, and the contract is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term,

The contract shall be deemed to be a contract by way of gambling on loss by maritime perils, and the person effecting it shall be guilty of an offence, and shall be liable, on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding six months or to a fine not exceeding one hundred pounds, and in either case to forfeit to the Crown any money he may receive under the contract.

* * * * * * * *

(5) If proceedings under this Act are taken against any person (other than a person in the employment of the owner of the ship in relation to which the contract was made) for effecting such a contract, and the contract was made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term, the contract shall be deemed to be a contract by way of gambling on loss by maritime perils unless the contrary is proved.

Civil Code of California

Sec. 2551. Insurance without interest, illegal. The sole object of insurance is the indemnity of the insured, and if he has no insurable interest the contract is void.

GRANT v. PARKINSON.

(Court of King's Bench, 1781. 3 Doug. 16.)[10]

This was an action on a policy of insurance at and from Surinam to Quebec, upon any kind of goods and merchandizes, and also upon the body of the ship Providence. The said goods and merchandizes, &c. for so much as concerns the assured, by agreement, are valued at £1000., being on profits expected to arise on the cargo of the above ship in the event of her safe arrival at Quebec; and in case of loss, the insurers agree to pay the same without any other voucher than this policy.

The cause was tried before Lord Mansfield at Guildhall, when the evidence was, that this ship was laden with molasses; and the plain-

[10] S. C., Park, Ins. (6th Ed.) 354; Marsh. Ins. (2d Ed.) 97.
Arguments of counsel and concurring opinions of Willes, Ashhurst, and Buller, JJ., are omitted.

tiff, having a contract to supply the army with spruce beer, would, if the ship had arrived, have made a profit of £1000. more than the sum insured, and that it was common to insure profits. A verdict was found for the plaintiff, with liberty for the defendant to move for a new trial. A rule having been obtained to show cause why the verdict for the plaintiff should not be set aside and a new trial granted.

Lord MANSFIELD. On argument, and after consideration, I have changed the opinion which I held at the trial, that this policy is void. Before the statute, nothing was so common as a valued policy; and then, at the trial, there was no necessity to prove either value or interest, whether the words "without further proof than the policy" were, or were not added.[11] Then this statute was made; and in the construction of it, it has been held, whether right or wrong it is now immaterial to inquire, that a valued policy is not void, but it is sufficient if the party proves some interest. The other side may show that this is a mere evasion of the act; but in general nothing is necessary on a valued policy but to prove some actual interest. In the present case the insurance is made by a contractor for spruce beer on the profits to arise from a cargo of molasses. If the ship arrives the profit is certain. The policy is not meant to conceal the interest, but to get rid of the proof of the quantum. I cannot distinguish this from the common case of a valued policy. The words of the statute are very strong, and so they struck me at Guildhall; and if it had been a new question on the validity of a valued policy, doubts might have been entertained; but it is not a new question. * * *

Rule discharged.[12]

GEDGE v. ROYAL EXCHANGE ASSUR. CORPORATION.[13]

(Commercial Court, 1900. 2 Q. B. 214.)

KENNEDY, J. This action is brought by the plaintiffs, who are insurance brokers, suing really on behalf and for the benefit of a Mr. Rouse and certain other gentlemen associated with him, against the defendants, on an alleged policy of marine insurance, dated November 14, 1898, upon the British steamer Radnorshire, belonging to the "Shire" line. The policy, as pleaded by the plaintiffs, is a policy for

[11] See Craufurd v. Hunter, 8 T. R. 23 (1798); Lucena v. Craufurd, 2 Bos. & Pul. N. R. 321 (1806); Cousins v. Nantes, 3 Taunt. 523 (1811).—[*Rep.*

[12] As to the insurance of profits, see Le Cras v. Hughes, 3 Doug. 81 (1782); Henrickson v. Margetson, 2 East, 550, note (1776); Barclay v. Cousins, 2 East, 544 (1802); Hodgson v. Glover, 6 East, 316 (1805); Lucena v. Craufurd, 3 Bos. & Pul. 75 (1802); Id., 2 Bos. & Pul. N. R. 269 (1806); King v. Glover, 2 Bos. & Pul. N. R. 206 (1806); Eyre v. Glover, 16 East, 218 (1812); Id., 3 Campb. 276 (1812). Where not only the profits are an expectation, but the obtaining a cargo, out of which the commission constituting the profits is to arise, is also an expectation, the interest is not an insurable interest within 19 Geo. II, c. 37; Knox v. Wood, Park, Ins. (6th Ed.) 356.—[*Rep.*

[13] The statement of facts and arguments of counsel are omitted.

£400. on the said steamship at and from London to Yokohama, to pay a total loss in the event of the vessel not arriving at Yokohama on or before midnight on December 31, 1898. It is pleaded by the plaintiffs that the vessel did not arrive at Yokohama on or before midnight on that day, and the amount insured is claimed by the plaintiffs. In fact, as appeared when the document was produced by the plaintiffs in evidence, the alleged policy is what is known as a "p. p. i." or "honour" policy, one of its terms being that, in the event of loss, "it is hereby agreed that this policy shall be deemed a full and sufficient proof of interest." The defendants, in the points of defence, do not plead the invalidity of the alleged policy under the provisions of 19 Geo. II, c. 37, s. 1. Their pleaded defences, in addition to a refusal to admit the correctness of the statement of the plaintiffs as to the terms of the alleged policy, are—(1) concealment of material facts, and (2) that the persons on whose behalf the plaintiffs effected the alleged policy had no insurable interest in the subject-matter insured.

The alleged policy was in truth, so far as regards the purpose of Mr. Rouse and certain other gentlemen for whom it was effected, a mere wager or wagering speculation. It appears that some time before November 14, 1898, the Government of Japan had made an ordinance whereby goods imported into Japan after December 31, 1898, should be liable to a higher duty than had previously been levied. This was known to Mr. Rouse, who was employed in the London office of a Japanese insurance company, called the Nippon, and he had a conversation with a Mr. Pound, who was an insurance clerk in the plaintiffs' office, upon the subject of insurances being, in consequence of the ordinance, effected in regard to the arrival in Japan of vessels carrying goods to that country. It occurred to Mr. Rouse that there was an opportunity of having what he called a "spec." He asked Mr. Pound if he thought he would be able to do a "spec." for him; Pound said he thought he might be able. They then parted. Mr. Rouse returned to his office, and read in Lloyd's Shipping Gazette that the Radnorshire was the vessel of the line of steamships running between London and Japan under the management of Messrs. Jenkins & Co. which had last sailed for Japan, and that she was reported to have passed the Downs on October 30. Believing that a vessel of that type might be expected to take, roughly, about two months on the voyage, he saw from her reported position that, to use his own words, her arrival before January 1, 1899, was obviously a close thing and what be wanted for a "spec." He mentioned his project to certain other gentlemen in the Nippon office, and they agreed to share with him in the speculation. In the result, through Mr. Pound (acting as the agent to propose an insurance), Mr. Rouse and his fellow-speculators carried out their project by obtaining from the defendants the policy in question, the slip for which was initialled by

Mr. Toulmin on behalf of the defendant company. Had Mr. Toulmin known the real nature of the transaction—namely, that it was a mere bet or speculation without any interest on the part of those for whom in reality the insurance was effected—he would have declined the risk altogether. It is at the same time only just to Mr. Rouse and his friends to add that they appear to have desired throughout the transaction to act in a candid and straightforward manner. It was not through any fault of theirs that the purely speculative nature of the transaction was not disclosed to Mr. Toulmin.

It appears to me that when upon the trial of an action the plaintiffs' case, as happens here, discloses that the transaction which is the basis of the plaintiffs' claim is illegal, the Court cannot properly ignore the illegality and give effect to the claim. Here the insertion of the p. p. i. clause taints the whole of the plaintiffs' case. The statute 19 Geo. II, c. 37, s. 1, expressly forbids the making of an assurance upon a British ship without further proof of interest than the policy, and goes on to declare that every such assurance shall be null and void to all intents and purposes. It has been suggested by the plaintiffs that the present policy is not a policy on a ship within the meaning of this section. I am clearly of opinion that it is. An assurance whereby the assured is entitled to be indemnified against loss in respect of the non-arrival of the ship at a certain port by a certain date may, I think, be correctly described as an assurance on the ship. If authority is wanted, I think that it appears in the case—very similar indeed in its circumstances—of Kent v. Bird (1777) Cowp. 583, which was decided upon the same statute. There the defendant undertook that a vessel should save her passage to China that season, and, in the action brought upon the document of insurance, judgment was given for the defendant on the ground that the transaction was the making of a gaming or wagering policy on a ship within the meaning of the statute.

Attempts to narrow the section when it speaks of an assurance on goods, merchandise, and effects, similar to the attempt of the plaintiffs in this case in regard to an assurance upon "ship," were unsuccessfully made in Smith v. Reynolds (1856) 1 H. & N. 221; De Mattos v. North (1868) L. R. 3 Ex. 185; Allkins v. Jupe (1877) 2 C. P. D. 375; Berridge v. Man On Insurance Co. (1887) 18 Q. B. D. 346. These cases shew that assurances on profits, commission, and advances are covered by the section, when it speaks of assurances on "goods, merchandise or effects."

This policy, then, being an illegal instrument—an assurance which, in the language of Grove J. in Allkins v. Jupe, 2 C. P. D. 375, is contrary to the direction of the statute, and so unlawful in all its incidents that the law will not countenance any part of it—I cannot give judgment upon it in favour of the plaintiffs. Their counsel argued that the illegality was not pleaded by the defendants; in my opinion that makes no difference. "Ex turpi causa non oritur actio. This old

and well-known legal maxim is founded in good sense and expresses a clear and well-recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him": per Lindley L. J. in Scott v. Brown, Doering, McNab & Co. (1892) 2 Q. B. 724.[14]
* * *

Judgment for the defendants.

JUHEL v. CHURCH.

(Supreme Court of New York, 1801. 2 Johns. Cas. 333.)

This action was brought for a return of premium. At the trial, a verdict was found for the plaintiffs, subject to the opinion of the court, on a case; and if the court should be of opinion against the plaintiffs, a judgment of nonsuit was to be entered.

The plaintiffs chartered the ship Three Sisters, to bring a cargo of wines, from the Spanish Main to New York; and had insured, by a valued policy, $12,000, on goods, for the voyage. But although, in the printed part of the policy, the same was stated to be on goods, yet by a memorandum, in writing, at the bottom of the policy, it was declared to be on profits, and that no other proof of interest was to be required than the policy, and that if the goods did not arrive, the assured was to recover for a total loss; and the same was warranted free from average, and without benefit of salvage to the insurer. The ship found no cargo at the Spanish Main, and returned to New York in ballast, without any goods whatever.

KENT, J. I consider this as a wager policy. It has the indicia of a wager policy, as they are pointed out by the cases on the subject. Doug. 468; Park, 259. Here was to be no other proof of interest required, than the policy itself; and if the goods did not arrive, the insurer was to pay. It was, in fact, betting on the return of the ship; and if she had not returned, in consequence of any peril enumerated in the policy, the plaintiff would, on its production, have been entitled to the sum insured.

As the plaintiffs claim a return of premium, it has been made a question whether this be a valid policy. If it be unlawful and

[14] The remainder of the opinion, dealing with a rule of court, and further holding that the failure to disclose the speculative character of the insurance constituted a fatal concealment, is omitted.

consequently void, on the ground of its being a wager policy, the assured is not entitled, at any rate, to a return of premium, for "in pari delicto potior est conditio possidentis." It was so decided in the cases of Lowry v. Bourdieu, Doug. 468, and Andre v. Fletcher, 3 Term Rep. 266. But supposing the policy to be good, (and I wish not to be understood as intimating any opinion to the contrary,) I am equally of the opinion, that the plaintiffs are not entitled to recover; because the defendant has run a risk, which is the consideration for the premium. I consider this policy as amounting to a bet on the return of the ship. If she had not returned, and the plaintiffs could have shown it was in consequence of some peril within the purview of the policy, they must have been entitled, as a matter of course, to the sum insured, without proving any interest or goods on board. The defendant must, therefore, be considered as having run the risk of the ship, during the voyage. But as the ship returned in safety, I do not consider him responsible because the goods did not arrive. It could never have been the meaning of the parties that, whether the ship did or did not arrive, the defendant was, at all events, to pay the $12,000. This would be a contract without any reciprocity, and altogether absurd. The plaintiffs, by the form of this action, have given a different interpretation to it. The policy enumerates a variety of perils or risks, which the defendant assumed to run; and there must have been some subject to which they could be applied, and this, in the present case, could be no other than the ship. When, therefore, the policy says, that no other proof of interest was to be required than the policy, and that, if the goods, did not arrive, the assured was to recover, its meaning was, that if the ship did not arrive in consequence of any peril mentioned, the assured was to recover the value of his profits, without proving any goods on board, from which the profits were to arise.

As the defendant has, therefore, run the risk intended by the policy, I see no pretence for a return of premium, and judgment of nonsuit ought to be entered.

RADCLIFF and LEWIS, JJ., were of the same opinion. LANSING, C. J., dissented.

Judgment of nonsuit.

PRITCHET v. INSURANCE CO. OF NORTH AMERICA.

(Supreme Court of Pennsylvania, 1803. 3 Yeates, 458.)

Action on a policy of insurance, on goods on board the brig Neutrality, William Clark, master, at and from Philadelphia, to one port in Martinico, and at and from thence to St. Thomas's, subscribed 2d March 1798. The goods were valued at $15,000, and insured at a premium of 17½ per cent.; and the policy was assigned over by the insured to Sparks and Lloyd on the 29th March following.

The brig sailed from the capes of Delaware on the 16th March, and was captured in her voyage to Martinico on the 19th April, by the French privateer Jealous, Captain Kautier, who put a French crew on board. On the 21st April she arrived at Point Petre, in Guadaloupe, and on the next day the captain made his protest. On the 1st May the brig and cargo were condemned in the French Court of Admiralty, on the ground of being bound to an enemy's port in rebellion against the French Republic.

The defendants had likewise underwrote a valued policy on the body of the vessel for $5,000, and admitting that there had been a total loss, had paid on account of both policies, at different times, $15,858.91, and about three weeks before the trial, had tendered to Sparks $829.31, the return premium and interest thereon, but had neither paid off the costs nor brought the money into court. They resisted the plaintiff's claim of $4,812.09, on the ground of an over insurance.

The plaintiffs owned the vessel and cargo when the policies were under written, but effected no insurance on the freight of the goods, which at the usual freight of $2 per barrel, amounted to.. $ 3,814 16

And it appeared, that the prime cost of the cargo, and the premium of insurance thereon, were..... 11,182 56

So that if it was intended to insure the freight, there was only over insured, the sum of..... 3 28

$15,000 00

A respectable merchant was called on after the trial had proceeded a considerable length, who gave evidence, that the premium on freight insured in this port was usually the same as on vessels and cargoes, though it was otherwise in the port of New York; and that the profits on goods were frequently insured as goods merely, and it was so understood generally by the contracting parties. Coffee known to have been laid in at 16 cents per pound, had often been insured in valued policies at 22 cents per pound, the difference of 6 cents being contemplated on both sides as profits, and so of other articles.[15]

YEATES, J., gave the charge of the court, in the absence of the Chief Justice, who was indisposed.

The verdict must necessarily be for the plaintiff. But whether it should be for the $829.31 which the defendants have admitted to be due by their late tender, and yet have not brought the same into court and paid off the costs, or for the $4,812.09, the balance claimed by the plaintiff is the only question.

The British statute of 19 Geo. 2, c. 37, passed in 1746, and was intended to put an end to insurances without real interest, which in process of time had become a cover for mere gaming contracts. (Vide history of wager policies since the Revolution, in 1 Marsh. 99.)

[15] The arguments of counsel are omitted.

There is a seeming contrariety between the opinions of Park and Marshall, whether under the statute the valuation specified in a valued policy is to be the measure of damages in case of a total loss. They however agreed in this, that where valued policies are used merely as a cover to a wager, they would be considered as an evasion of the statute, as in the instance put by Lord Mansfield, of one insuring £2000. and having interest on board to the value of a cable only. 2 Burr. 1171. If the property be much over-valued, it must be done with a bad view, either to gain, contrary to the words of the act, or with some view to a fraudulent loss. Ibid., Park, 122; 1 Marsh. 110.

Serjeant Marshall, in his useful treatise, professes in his preface to point out any decision, or any doctrine advanced, which militated against any acknowledged principle of law, and to treat them with a proper freedom but with decency and respect. Hence, he has been led to consider the usage, though sanctioned by the approbation of great and eminent judges, that in cases where the interest of the insured is less than the sum insured in a valued policy, to pay the whole sum insured, upon a total loss, as irreconcilable with the provisions of the Stat. of 19 Geo. 2, c. 37, and tending to convert every loss into a total one. 1 Marsh. 111. And he expressly asserts, that the value in the policy, ought only to be considered as prima facie evidence of the amount of the interest of the insured; which being admitted, on his mere representation, the insurer is not thereby concluded, but may dispute the amount of the interest if it be over-valued, as well in an action upon a valued policy, as upon an open one. But he nevertheless agrees in the passage already cited, that the usage which he condemns, is uniform and constant, and approved of by authority, and that courts of justice will not scrupulously examine the valuations in valued policies, where an indemnity was honestly intended. 1 Marsh. 202.

We shall confine ourselves to the case immediately before us. We mean to give no opinion, whether the apprehensions of Marshall, as to the true intention of the English statute, are well or ill founded.

The Chief Justice, during the argument, conveyed the sentiments of the whole court. We have adopted the policy and principles which gave rise to the act of Parliament, both in courts of justice and by commercial usage; but we are not prepared to say, that every particular provision or resolution under it, has been engrafted into our system of law. An insurance amongst us, is a contract of indemnity. Its object is, not to make a positive gain, but to avert a possible loss. A man can never be said to be indemnified against a loss which can never happen to him. There cannot be an indemnity without a loss, nor a loss without an interest. A policy, therefore made without interest, is a wager policy, and has nothing in common with insurance, but name and form. 1 Marsh. 30, 97. It is not subservient to the true interests of fair trade and commerce; but is pregnant with as much mischief, both public and private, as can proceed from any spe-

cies of gaming, which the legislature has hitherto found it necessary to repress. Ib. 98. Every species of gaming contracts, wherein the insured having no interest, or a colourable one merely, or having a small interest, much over-values it in a valued policy, under the cloke of insurances, are reprobated both by our law and usage.

It is obvious, that if the mercantile practice of this port has been sufficiently established, that profits are understood to be insured under the character of goods merely, an end is at once put to the present question. Because $3,817.44 could not be deemed an extravagant profit on the cargo, at a West India market. But independent of this usage, does not the case itself present such outlines as to evince, that the cargo has been but little over-valued? Two voyages were meditated by the insured, "at and from Philadelphia, to one port in Martinico," and at and "from thence to St. Thomas's" and the defendants subscribed the policies on the brig and cargo for both voyages, and received a premium proportioned to the risk. Admit the freight of the vessel was not insured, still the aggregate amount of the prime cost of the goods, premium, and of the expences necessarily attendant on the transportation of the goods to Martinico, formed a fair object of insurance.

The plaintiffs do not seek an indemnification in the light of shipholders for the loss of their freight, but as owners of the cargo, for the additional cost of conveying it to Martinico. This appears to be a fair and honest transaction, without any kind of misrepresentation. It possesses no single feature of a gambling policy. The defendants have received the large premium of $3501 on both policies, on the entire valuations, and are therefore bound to make up the whole loss. Should a different doctrine prevail, a valued policy, instead of operating as an admitted agreed value of the property on the trial, would be of no possible use, but an injury to the insured. If the voyage should be safely performed, the underwriters would retain the full premium on the whole valuation; but if it should be unsuccessful, the insured would only recover the amount of the first cost of the goods put on board, with the proper premium thereon. These remarks go on the ground of the insurance being intended as a real indemnity, and not where the policy has been effected on gaming principles.

The jury found a verdict for the plaintiff for $4812.09, without leaving the bar.[16]

[16] In Lewis v. Rucker, 2 Burr. 1167, 1171 (1761), Lord Mansfield, C. J., in answer to the objection that the policy in suit was a wager policy, because valued, said:

"A valued policy is not to be considered as a wager policy, or like 'interest or no interest'; if it was, it would be void by the act of 19 Geo. 2, c. 37. The only effect of the valuation is fixing the amount of the prime cost, just as if the parties admitted it at the trial; but in every argument, and for every other purpose, it must be taken that the value was fixed in such a manner as that the insured meant only to have an indemnity.

"If it be under-valued, the merchant himself stands insurer of the surplus. If it be much over-valued, it must be done with a bad view; either to gain, contrary to the 19th of the late King, or with some view to a fraudulent loss

RUSE v. MUTUAL BENEFIT LIFE INS. CO.

(Court of Appeals of New York, 1861. 23 N. Y. 516.)

SELDEN, J.[17] * * * Our inquiry, therefore, is, whether at common law, independent of any statute, it is essential to the validity of a policy, obtained by one person for his own benefit upon the life of another, that the party obtaining the policy should have an interest in the life insured.

A policy, obtained by a party who has no interest in the subject of insurance, is a mere wager policy. Wagers in general, that is, innocent wagers, are, at common law, valid; but wagers involving any immorality or crime, or in conflict with any principle of public policy, are void. To which of these classes, then, does a wagering policy of insurance belong?

Aside from authority, this question would seem to me of easy solution. Such policies, if valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptations to the party interested to bring about, if possible, the event insured against. In respect to insurances against fire, the obvious temptation presented by a wagering policy to the commission of the crime of arson has generally led the courts to hold such policies void, even at common law. It was so held in England, at an early day, by Lord Chancellor King in Lynch v. Dalzell, 4 Bro. P. C. 431, and by Lord Hardwicke, in Saddlers' Company v. Badcock, 2 Atk. 557; and the courts in this country have generally acquiesced in and approved of the doctrine. In this state such policies would fall under the condemnation of our statute avoiding all wagers and gambling contracts of every sort; but they would, no doubt, also be held void, independently of that statute, at common law.

Therefore the insured never can be allowed in a court of justice to plead that he has greatly over-valued, or that his interest was a trifle only.

"It is settled 'that, upon valued policies, the merchant need only prove some interest, to take it out of 19 Geo. 2, because the adverse party has admitted the value; and if more was required, the agreed valuation would signify nothing.' But if it should come out in proof that a man had insured £2000. and had interest on board to the value of a cable only, there never has been, and I believe there never will be a determination, that by such an evasion the Act of Parliament may be defeated.

"There are many conveniences from allowing valued policies; but where they are used merely as a cover to a wager, they would be considered as an evasion.

"The effect of the valuation is only fixing, conclusively, the prime cost. If it be an open policy, the prime cost must be proved; in a valued policy, it is agreed."

As to the effect of over-valuation in case of valued policies, see Kane v. Com. Ins. Co., 8 Johns. (N. Y.) 229 (1811); Clark v. Ocean Ins. Co., 16 Pick. (Mass.) 289 (1835).

[17] That part of the opinion of the court in which it was held that an alluring prospectus issued by the defendant formed no part of the insured's contract is omitted, as is that part holding that the gaming statutes of New Jersey, the law of which is found to be applicable, did not prohibit wagering policies.

In Howard v. Albany Insurance Company, 3 Denio, 301, Bronson, C. J., asserted the necessity of an interest in the assured in all such cases, referring, in support of the doctrine, not to the statute, but to the decisions of the Lord Chancellors King and Hardwicke, supra.

In regard, however, to marine insurances, a different rule seems to have prevailed in England; and the cases of Clendining v. Church, 3 Caines, 141, Juhel v. Church, 2 Johns. Cas. 333, and Buchanan v. Ocean Insurance Company, 6 Cow. 318, are supposed to have established the same rule in this state. No reason, that I am aware of, has ever been given for this difference between fire and marine policies. The latter, when of a wagering character, are vicious and evil in their tendencies as well as the former, and have been generally considered as noxious and dangerous, whenever the question has arisen. They should, therefore, as it would seem, for the reasons applied to policies against fire, have been held void, as contrary to public policy.

The distinction between these two classes of policies is, in my view, a mere matter of accident, and grew out of the peculiar manner in which the question was presented in respect to marine policies. The case of Depaba v. Ludlow, Comyn, 361, shows how the doctrine, that wagering policies upon ships are valid, originated. The defendant there had insured the plaintiff, "interest or no interest." On the trial it was objected that the plaintiff could not recover, unless he had a property in the ship; but the court said that the insurance was good and that the import of the clause, "interest or no interest," was, that the plaintiff had no occasion to prove his interest. Had the question been directly presented in this case, whether a mere wagering policy was valid, the decision would, I think, have been different. The case itself shows the court to have supposed that the plaintiff actually had an interest; and it is apparent, from the authorities, that it had always been previously held, in suits upon policies not containing the words "interest or no interest," or other equivalent words, that the plaintiff must aver and prove that he had an interest. This is distinctly asserted by Lord Hardwicke, in the case of Saddlers' Company v. Badcock, supra; and in the case of Crauford v. Hunter, 8 Term, 14, the counsel, on looking into the precedents at the request of the court, found that it had been the uniform practice, in suits upon marine policies, to insert an averment of interest. To me, therefore, it seems clear, that the decision in Depaba v. Ludlow was made because the court failed to distinguish between a waiver of proof at the trial, which the defendant was, of course, at liberty to make, and a waiver in the policy itself, by which it was converted into a mere wager.

In consequence of this case, and others which followed it, Parliament was forced to interfere, as it did, by the act of 19 George II

(chapter 37), reciting the mischiefs which had arisen from the making of marine insurances, "interest or no interest," and prohibiting them thereafter; and when the question subsequently arose in Crauford v. Hunter, supra, as to the validity at common law of a mere wagering policy upon a ship, it was held to be valid, solely upon the authority of the recitals in this act. It was in this indirect way that the doctrine in question, as to marine policies, first crept into the law. It was important to show this, because the effect of what I consider as the inadvertence of the court in Depaba v. Ludlow was not confined to policies upon ships. It must have been, I think, in consequence of the doctrine initiated by that case, that it came to be understood in England that, in insurances upon lives, it was not necessary at common law that the party to be benefited by the policy should have any interest in the life insured. There may not have been any direct decision to that effect; yet, that such was the prevalent impression, is to be inferred from the enactment of the statute of 14 George III (chapter 48), prohibiting insurances upon lives where the person insuring had no interest in the life. Angell, in speaking of this statute, says: "At common law it seemed to have been thought unnecessary that, at the time of effecting the policy, the assured should have had any interest which might be prejudiced by the happening of the event insured against." Ang. on Life and Fire Ins. § 297. In New Jersey they have no such statute; and the question now to be decided, therefore, is, whether the impression which seems to have prevailed in England prior to the statute of 14 George III was well founded.

That impression does not appear to be supported by any adjudged case. Life insurance seems not to have been practised to a great extent in England until a comparatively modern date, and the probability is, that as soon as such insurance became frequent, the evils of gambling in them was so apparent that Parliament interposed, upon the assumption that the same rule would be applied to them as to insurances upon ships. I cannot regard that act as affording any very strong evidence, that, at common law, wagering policies upon lives were valid. It seems to me, that, were the naked question presented, whether such a policy comes within the admitted exception to the validity of wagers in general, that is, whether it is repugnant to a sound public policy, no court, not hampered by some unfortunate or mistaken precedent, would hesitate for a moment in holding the affirmative. In Massachusetts, in Vermont, in Pennsylvania, and I believe other states, it has been so held in regard to wager policies in general. But policies without interest, upon lives, are more pernicious and dangerous than any other class of wager policies; because temptations to tamper with life are more mischievous than incitements to mere pecuniary frauds.

Chancellor Kent was evidently embarrassed by the position of this question in England. He commences his remarks on the subject by saying that "the party insuring must have an interest in the life insured," and then immediately refers to the English statute, of 14 George III, chapter 48, but says not a word upon the question whether at common law an interest was necessary. He, however, concludes by saying that "the necessity of an interest in the life insured, in order to support the policy, prevails generally in this country, because wager contracts are almost universally held to be unlawful, either in consequence of some statute provision, or upon principles of the common law." 3 Kent, Com. 368.

This obscure manner of treating the subject is plainly to be attributed to the reluctance of the learned author to admit (notwithstanding the impression that appears to have obtained in England) that gambling in life insurance could be tolerated at common law. That impression has been here traced, as I think, with justice to the very questionable doctrine of the English courts in regard to marine policies. It has never, that I am aware of, been recognized and adopted by any American court, and is so obviously repugnant to the plainest principles of public policy, that it is somewhat surprising that it should ever have existed. My conclusion, therefore, is, that the statute of 14 George III, avoiding wager policies upon lives was simply declaratory of the common law, and that all such policies would have been void, independently of that act.

It is said that the defendants, by issuing the policy upon the representation of the plaintiff that he had an interest, have admitted his interest, and that the production of the policy is at least prima facie evidence of such interest. This position cannot be sustained. All the older authorities show, that even in actions upon marine policies, not containing the clause "interest or no interest," it was necessary to aver, and of course to prove, the interest of the plaintiff. It is an indispensable part of the plaintiff's case, to be made out affirmatively at the trial. Upon this ground, therefore, as well as that before considered, the judgment of the Supreme Court must be reversed; and there must be a new trial, with costs to abide the event.

All the judges, except DAVIES and MASON, JJ., concurred that the plaintiff must show an interest in the life insurance. On the question of evidence in respect to the prospectus being admissible as part of the policy or entering into the contract, COMSTOCK, C. J., and DAVIES and JAMES, JJ., dissented.

Judgment reversed, and new trial ordered.[18]

[18] The presence of a clause in the policy making it incontestable after a certain time does not do away with the necessity of insurable interest.

"It is also insisted for the plaintiff that as the policies contain a clause to the effect that they are incontestable after one year, the company cannot

TRENTON MUT. LIFE & FIRE INS. CO. v. JOHNSON.

(Supreme Court of New Jersey, 1854. 24 N. J. Law, 576.)

ELMER, J.[19] * * * But the error principally relied on, and the one most important is, that the court refused to charge as requested, "that under the facts proved the plaintiff had not shown an insurable interest to the full amount of the policy; that the policy was not a valued policy, but a policy of indemnity, and that the defendants were not bound to the full extent of the insurance unless on proof to such extent of the value of such interest;" and that on the contrary, the court charges, "that under the facts proved, and considering that the nature and extent of the plaintiff's interest was truly stated to the defendants, at the time the insurance was effected, so far as the question of interest was concerned, sufficient was shown on the part of the plaintiff to entitle him to recover to the full amount of the policy. A policy of life insurance is a valued policy. Where a man effects an insurance upon his life, the amount to be recovered is the amount insured, there can be no other measure. In such cases insurers are bound to the full amount of such insurance, without proof of the value of interest to that extent."

The policy was effected by Johnson, the plaintiff, and Van Middlesworth, jointly, for the sum of one thousand dollars, for the use, benefit and account of the said Johnson to the amount of five hundred dollars, and for the use, benefit and account of the said Van Middlesworth, to the amount of five hundred dollars;

rely upon this defense [lack of insurable interest]. But the incontestable clause is no less a part of the contract than any other provision of it. If the contract is against public policy the court will not lend its aid to its enforcement. The defense need not be pleaded. If at any time it appears in the process of the action that the contract sued upon is one which the law forbids, the court will refuse relief. The parties to an illegal contract cannot by stipulating that it shall be incontestable, tie the hands of the court and compel it to enforce contracts which are illegal and void. If this were allowed, then the law might be evaded in all cases and the aid of the court might be secured in aid of its infraction. In Hall v. Coppell, 7 Wall. 558, 19 L. Ed. 244 [1868], the United States Supreme Court said: 'The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, 'Ex dolo malo non oritur actio,' is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation.'" Hobson, C. J., in Bromley's Adm'r v. Washington Life Ins. Co., 122 Ky. 402, 92 S. W. 17, 28 Ky. Law Rep. 1300, 5 L. R. A. (N. S.) 747, 121 Am. St. Rep. 467, 12 Ann. Cas. 685 (1906).

[19] Only that part of the opinion relating to insurable interest is printed.

and the declaration avers that the plaintiff, at the time and until the death of the said Van Middlesworth, was interested in his life in a large amount, to wit, the amount of five hundred dollars. The objection made on the trial, to the recovery for want of interest, and the charge on that subject, had reference only to the sum of five hundred dollars, insured for the benefit of Johnson, no objection having been made on that score to the recovery of the five hundred dollars insured for the benefit of Van Middlesworth himself. The declaration also avers that the nature of the plaintiff's interest in the life of Van Middlesworth was stated to the agents of the company, and the bill of exceptions shows that this averment was sustained by the proof. His interest was this: Van Middlesworth and the plaintiff, together with certain other persons, had entered into an association called The New Brunswick and California Mining and Trading Company, the capital stock of which consisted of forty-five shares, of six hundred dollars each. The members were partly shareholding members and partly active members; the shareholders being required to furnish a substitute to proceed to the mines of the company. The plaintiff owned one share, advanced six hundred dollars of capital, and procured Van Middlesworth to go out as his substitute, which he did and acted as his agent and substitute, and the assets of the company having been divided in California, before his death, he received the plaintiff's share, dying before he had returned and paid over the same. By one of the articles of the association, all treasures and all the proceeds of the labor of each member, and all profits, were to go into the general fund for the benefit of the whole.

On behalf of the plaintiffs in error, it was insisted that the contract of insurance is simply a contract of indemnity, and that the plaintiff below having failed to show an interest in the life of Van Middlesworth, to the extent of five hundred dollars, was not entitled to recover that sum, and that the judge erred in not so charging. Our first inquiry, therefore, must be as to the nature of the contract itself.

The case of Godsal v. Baldero, 9 East, 72, is the leading case relied on to show that a contract of life insurance is simply a contract of indemnity, not only requiring an interest in the assured in order to give validity to it at its inception, but continuing good only so far as it is rendered so by the permanence of such an interest. This case has been since adhered to and has often been considered as founded on the common law, an impression to which some countenance is given by some of the language used by Lord Ellenborough in giving the opinion of the court. It is evident, however, that the decision was warranted not by the common law, but by the statute of 14 Geo. 3, c. 48, which does not purport to be a declaratory act, but enacts in express terms, that no insurance shall be made on the life of any person wherein the person

for whose use such policy shall be made shall have no interest, and that in all cases where the insured hath interest in the life, no greater sum shall be recovered or received from the insurers than the amount or value of the interest of the insured in such life. This statute not extending to Ireland, the courts in that country have held in several recent cases, that at the common law, policies of insurance are valid without any interest. Ferguson v. Lomax, 2 Dru. & Walsh, 120, 238; Brit. In. Co. v. Magee, Cook & Al. 182; Scott v. Roose, Long & Town Ir. R. 54; Shannon v. Nugent, 1 Hayes' Ir. R. 539, cited in Bunyon on Life Insurance, p. 11.

No such statute exists in this state. Whether an action can be sustained on a policy without interest, which is therefore in some respects like a mere wager on the life of a third person, or any other wager relating to a transaction in itself legal, does not appear to have been decided by our courts. The case of Mulford v. Bowen, 9 N. J. Law, 315, was an action upon a wager about the weight of a hog, in which the judgment was reversed upon the ground of variance, no notice having been taken by the court of the general question, although it was directly involved, and was argued by the counsel. In the case of Hutchinson v. Targee, 14 N. J. Law, 386, a wager policy depending upon the result of a lottery, was held void, upon the special ground that it contravened the policy of the act for suppressing lotteries. Wagers on indifferent questions are held good grounds of action in England; and it was there held that at common law wagering policies of insurance were valid. Crauford v. Hunter, 8 Term R. 13. In New York, actions on wager policies and other wagers, were sustained, until a statute was passed declaring them illegal. Buchanan v. Ocean Ins. Co., 6 Cow. 318. In several other states, where statutes existed prohibiting gaming in such terms as were held to include all wagers, wager policies have been declared illegal. Amory v. Gilman, 2 Mass. 1; Babcock v. Thompson, 3 Pick. (Mass.) 446, 15 Am. Dec. 235; Adams v. Penn In. Co., 1 Rawle (Pa.) 107; Lloyd v. Leisenring, 7 Watts (Pa.) 294; Collamer v. Day, 2 Vt. 144. The American text writers strongly favor the doctrine that wager policies should in all cases be held bad, upon general principles of policy and morality. 3 Kent 277; Duer, Ins. 92; Angell on Life and Fire Ins. § 14, Intr. I confess, however, that whatever might be my opinion as to the expediency of a statute like that in England, before quoted, I must agree with the Irish courts in holding that such is not the law. Our act to prevent gaming (Rev. St. p. 572) does not, in terms or by implication, prohibit all wagers, but only particular kinds of gaming. Until the legislature shall think proper to interfere, the courts can only adhere to the common law as they find it established. To do otherwise, would be an act of legislation, and not of judicial construction.

It was insisted by counsel, and with much apparent force, that wagers on the life of a third person are in their very nature dangerous, and contrary to the policy of the law, and to sound morality. But the danger, if any exists, would apply with great, although not with equal force, to policies where there is an interest, as well as to those where there is none. All life insurances have been prohibited in some countries. The objection made to the wager in the case of Gilbert v. Sykes, 16 East, 150, was not merely that a wager on the life of another would endanger his assassination, the fear of the law being deemed sufficient to countervail that, but that the bet was on the life of Napoleon, a foreign sovereign, and grew out of a conversation upon the probability of his being assassinated, so that to entertain an action on it was considered to contravene public policy. As was well remarked in the argument of that case, such an objection would apply with equal force to cases for the life of a third person, which have never been held illegal. The cases of Earl of Chesterfield v. Jansen, 1 Atk. 346, 2 Ves. 25, and of March v. Pigot, 3 Burr. 2803, are direct authorities in favor of the legality of such wagers. And the same principle is sanctioned by the cases which uphold post obit securities, where in consideration of an immediate advance of money, bonds are given, or contingent or reversionary property charged, for the payment of a much larger amount, upon the death of a particular person. Curling v. Marquis Townsend, 19 Ves. 628; Free v. Hinde, 2 Sim. 7.

Modern experience has proved the value of insurances upon the insurer's own life, or upon the life of another, upon whom the insurer may be dependent, or in whose life he has a real or supposed interest. And it is worthy of notice, that even in England since the statute, so great is considered the injustice of requiring the continued subsistence of an insurable interest, that in practice it is disregarded, and the offices find it to their interest, and are in the common practice of paying, without any inquiry as to the interest. Bunyon, 23; Barber v. Morris, 1 Moo. & R. 66. An insurance upon life has, in fact, but a remote resemblance to a marine or fire insurance. In the latter, the particular object is to indemnify against a pecuniary loss; and the event upon which the money is made payable, is the happening of the loss, the contract being in terms to pay whatever is lost, not exceeding a specified sum. But a life insurance is a contract to pay a certain specific sum on the happening of a particular event, which may or may not occasion a pecuniary loss. Where that event is the death of the insured himself, there is nothing like an indemnity against loss to him, for he can never receive the money. In such a case, the object is to provide for some relative or friend, or creditor, and this person who is to be benefited by his death has, in many

cases, the same motive to desire it, as in the case where the premium is paid and the insurance obtained by a third person. Upon a view of the whole matter, I think it admits of great doubt whether the English statute, by throwing impediments in the way of life insurances, and by raising questions often of difficult solution as to the nature and amount of the required interest, can be regarded as wise and salutary. At all events, in the absence of any such legislation here, I see no solid ground upon which we can safely depart from the doctrines of the common law, and upon reasons of doubtful expediency, hold a policy of life insurance to be something different from what it purports to be—that is to say, a contract to indemnify against loss, and not a contract to pay a given sum, upon the happening of a particular event.

But if it be admitted that an interest in the life of Van Middlesworth on the part of Johnson, was necessary to be shown, I think it satisfactorily appeared that he had such interest. It is clear that the policy was entered into not as a cover for a wager, but for the bona fide purpose of securing Johnson against what he and the company regarded as a danger of real pecuniary loss. The interest required need not be such as to constitute the basis of any direct claim in favor of the plaintiff upon the party whose life is insured; it is sufficient if an indirect advantage may result to the plaintiff from his life, and therefore the reciprocal interests of husband and wife, parent and child, and brother and sister, in the lives of each other, are sufficient to support the contract. 2 Greenl. Ev. § 409; Lord v. Dall, 12 Mass. 115, 7 Am. Dec. 38. In a case before the circuit court of Albany, three persons, V., M. and S., entered into a co-partnership to carry on the liquor business. S. undertook the business, and against the capital of V. and M. was to put in his skill. S. insured his life for ten thousand dollars, and by the articles of co-partnership, in case of his death without children, or unmarried, his partners, V. and M., were to receive this sum secured by the policy. S. shortly afterwards died unmarried, M. assigned his interest to A., and A. and V. sued to recover the insurance. The court held that V. and M. had an insurable interest, and were entitled to recover. Valton et al. v. National L. F. Life Ass'n So.,[20] Angell on L. and F. Ins. p. 326, n. In the present case, Johnson had a direct interest in the life of his substitute, whose earnings were to constitute a part of the joint funds, of which he was entitled to his share, an interest fully equivalent to the interest of a wife in the life of her husband, of a child in that of a parent, or a sister in that of a brother. And at Van Middlesworth's death, although prior to that time the com-

[20] For the subsequent history of this interesting case, see Valton v. National Fund Life Assur. Co., 20 N. Y. 32 (1859); s. c. (subsequent appeal), *40 N. Y. 21 (1864).

pany had been virtually dissolved, he had an interest in him as his creditor, to the extent of his share of the assets in his hands.

I am, therefore, of opinion that there was no error in the ruling excepted to, and that the judgment must be affirmed.[21]

The CHIEF JUSTICE concurred.

SECTION 2.—WHAT CONSTITUTES INSURABLE INTEREST—MARINE INSURANCE

LE CRAS v. HUGHES.

(King's Bench, 1782. Park, Ins. [2d Am. Ed.] 269, s. c. 3 Doug. 81.)

An action upon a policy of insurance on the ship St. Domingo, at and from Omoa to London; upon which a case was reserved for the opinion of the court. The facts of the case were these: Captain Luttrell, commanding five of his majesty's ships, and Captain Dalrymple, commanding a party of the land forces, captured two Spanish register ships, lying under the protection of Fort Omoa; that the ship St. Domingo (on which the insurance was made) was one of the prizes, and was coming home laden with the property then captured, upon which ship the defendant underwrote 500 pounds; and that the ship was lost by perils of the sea. The question was whether, by virtue of the prize act of the 19 Geo. III, c. 67, the officers and crews of the ships under Captain Luttrell had such an insurable interest in the St. Domingo as to entitle them to recover?

[21] It is to be regretted that this important question has never come before the Court of Errors and Appeals of New Jersey. See Meyers v. Schumann, 54 N. J. Eq. 414, 417, 34 Atl. 1066 (1896). That the doctrine denying the necessity for the existence of an insurable interest as a basis for valid insurance is becoming firmly established in New Jersey is apparent from the following extracts from the opinion of the Supreme Court in Thomas v. National Benefit Ass'n, 81 N. J. Law, 349, 79 Atl. 1042 (1911): "The first cause for reversal is that the plaintiff had no insurable interest in the life of the insured, and therefore should have been nonsuited. This contention cannot prevail. Trenton Mutual Ins. Co. v. Johnson, 24 N. J. Law, 576 [1854]; Vivar v. Knights of Pythias, 52 N. J. Law, 455, 20 Atl. 36 [1890]; Sun Ins. Office of London v. Merz, 63 N. J. Law, 365, 43 Atl. 693 [1899]. Moreover, the contract, in which the beneficiary is described as "guardian," prescribed that "the beneficiary must have something more than a pecuniary interest in the insured, as speculative policies are not issued by this association"—a vague provision, and subject to interpretation by the court. But the writing and delivery of the policy, and the acceptance by the defendant of premiums, amounts to a practical interpretation of the policy by the parties, and it would be a fraud to permit the defendant thus to contract and receive the premiums, with full knowledge that the policy was void." On appeal the Court of Errors and Appeals affirmed the judgment of the Supreme Court on the ground that in fact an insurable interest existed. 84 N. J. Law, 281, 86 Atl. 375, 46 L. R. A. (N. S.) 779 (1913).

Lord MANSFIELD. There are two questions in this cause: 1st. Whether the sea officers had an insurable interest? This will depend on the prize act and proclamation. 2dly. Whether possession would entitle them to insure, upon the bare contingency of a future grant from the crown? As to the first, consider the act of parliament, which gives to all the people on board, that is, to the flag officers, commanders, and other officers, to the seamen, marines and soldiers on board every ship and vessel of war, the sole interest and property of and in all and every ship and vessel, goods and merchandises, which they shall take during the war, after condemnation. Does the act say, that the seamen only shall take? Does it leave a joint capture by the army and navy undefined? Certainly not. Suppose, for instance, a case which I remember to have happened: A Dutch and English fleet combined captured some ships; the English sailors could not take solely; nor could the act mean that they should have nothing. In the case in question, suppose Captain Dalrymple had given no assistance, is there any doubt that Captain Luttrell would have taken the whole? The only difference is, that now he has not the merit of a sole capture. The word "soldiers," in the proclamation, means soldiers on board the ship. Thus it stands on the act and proclamation. But supposing that doubtful, as far back as Queen Anne's time down to the present, wherever a capture has been made by a king's ship or a privateer, the crown has always given a grant of it after condemnation. There is no instance to the contrary. Have not, then, the insured such an interest in the ship coming home, as to entitle them to an indemnity? Suppose a man is made agent of prizes; he has not the possession of the property, and yet he has such an interest in any ship coming home, that he may insure. Here the insured have the possession, and a certain expectation of receiving the property captured for their own emolument from the crown.

Judgment for the plaintiff.[22]

[22] In Boehm v. Bell, 8 T. R. 154 (1799), an action was brought to recover premiums paid for insurance of a certain American vessel captured wrongfully, and subsequently restored to her owners by decree of the prize court. The opinion of Lawrence, J., was as follows: "The case turns on this short question, whether or not the assured had an interest which they might insure? Did they mean to game? or was not there a loss against which they might indemnify themselves, by a policy of insurance? I do not mean a certain, but a possible, loss. Now it has been shewn that this was a case in which the Court of Admiralty might have decreed them to pay damages and costs; and that is sufficient. It might be asked, in the language of Lord Mansfield in Le Cras v. Hughes, 'Had not the insured such an interest in the ship coming home, as to entitle them to an indemnity?' I think that they had; and therefore that the plaintiffs are not entitled to a return of premium."

BARCLAY v. COUSINS.

(Court of King's Bench, 1802. 2 East, 544.)

This was an action on a policy of insurance, dated the 27th August 1799, and effected by the plaintiff as agent for and on account of one Richard Wells on the ship Jonah, at and from Barbadoes to the coast of Africa, during her stay and trade there, and at and from thence back to her port or ports of discharge in the West Indies, at a premium of 25 guineas per cent. with various returns for convoy. The policy was declared to be on profits valued at £2000., and was underwritten by the defendant. The declaration contained averments that the ship sailed upon the voyage insured with a cargo of goods and merchandizes on board; and that the said Richard Wells was interested in the profits to arise and be made from the sale and disposal of the said cargo of goods and merchandizes to the amount insured; and stated a total loss by capture. The defendant pleaded the general issue, and paid the premium into Court. At the trial before Lord Kenyon at the sittings at Guildhall after last Trinity term, a verdict was found for the plaintiff for £221. 5s. subject to the opinion of this Court on the following case.

In February 1799, Richard Wells shipped a cargo of goods on his own account on board his own ship the Jonah at Barbadoes, to be carried on a trading voyage to the coast of Africa. The invoice value of the ship and cargo was about £5880. In April 1799, the plaintiff received an order from Mr. Wells to insure £6000. on this ship and cargo; in consequence whereof he effected an insurance to the amount of £8470. to cover the sum of £6000. ordered and the premiums of insurance thereon; which insurance was declared to be on the ship and cargo at and from Barbadoes to the coast of Africa, during her stay and trade there, and at and from thence back to her port or ports of discharge in the West Indies. On the 13th of August following, the plaintiff received a letter from Mr. Wells directing the insurance in question, which was thereupon accordingly effected. The said ship sailed from Barbadoes on the 29th of March 1799, upon the voyage insured, and arrived at Cape Mount her port of discharge in Africa on the 21st of July following; and thereupon the agents of the assured began to unload and sell her cargo, and with part of the produce thereof purchased 30 slaves; and on the 28th of August following, she was captured by three French frigates, but was afterwards given up to one George Hewitt for the purpose of conveying English prisoners to a British port, and arrived at Sierra Leone on the 6th of September, together with the said thirty slaves, and the remainder of her cargo, and a number of English prisoners; but was soon after deserted by the said George Hewitt and part of her crew; and her original captain refusing to take the charge of her, Captain Gray, the then acting governor of that settlement, gave the command there-

of to one Walter Stott, who accordingly took possession thereof. That by the direction of the said Walter Stott the 30 slaves were unshipped, and sent to Bance Island, where they were afterwards sold, and the remainder of the cargo was landed and sold at Sierra Leone, and produced the sum of £46. 6s. 6d. That the said brig afterwards departed for Barbadoes with prisoners on board, where she arrived, and where the Court of Admiralty adjudged to the said Walter Stott and the then crew of the said brig one full eighth part of the net proceeds thereof, and of the cargo on board her at the time she was taken possession of as aforesaid. The question for the opinion of the Court is, whether the plaintiff is entitled to recover.

This case was very fully argued first in Easter term 41 Geo. 3, by J. B. Warren for the plaintiff, and Giles for the defendant; and again in last Easter term, by Park for the plaintiff, and Adam for the defendant; but as the principal arguments and authorities were noticed by the Court in their judgment, which they took time to consider of till this term, it is unnecessary to state them in another form.

LAWRENCE, J. (in the absence of GROSE, J., who was indisposed) now delivered the opinions of GROSE and LE BLANC, JJ., and his own.

The case states, that the insured shipped on board the ship Jonah a cargo of goods to be carried on a trading voyage; so that it appears that he had an interest in the profits to arise from a cargo which was liable to be affected by the perils insured against. And the question is, if on an insurance made on the profits to arise from such cargo the plaintiff can recover? As insurance is a contract of indemnity it cannot be said to be extended beyond what the design of such species of contract will embrace, if it be applied to protect men from those losses and disadvantages, which, but for the perils insured against, the assured would not suffer: and in every maritime adventure the adventurer is liable to be deprived not only of the thing immediately subjected to the perils insured against, but also of the advantages to arise from the arrival of those things at their destined port. If they do not arrive, his loss in such case is not merely that of his goods or other things exposed to the perils of navigation, but of the benefits which, were his money employed in an undertaking not subject to the perils, he might obtain without more risk than the capital itself would be liable to: and if when the capital is subject to the risks of maritime commerce it be allowable for the merchant to protect that by insuring it, why may he not protect those advantages he is in danger of losing by their being subjected to the same risks? It is surely not an improper encouragement of trade to provide that merchants in case of adverse fortune should not only not lose the principal adventure, but that that principal should not in consequence of such bad fortune be totally unproductive: and that men of small fortunes should be encouraged to engage in commerce by their having the means of preserving their capitals entire, which would con-

tinually be lessened by the ordinary expences of living, if there were no means of replacing that expenditure in case the returns of their adventures should fail. Where a capital is employed subject to such risks, in case of loss the party is a sufferer by not having used his money in a way, which might with a moral certainty have made a return not only of his principal but of profit: and it is but playing with words to say, that in such case there is no loss because there is no possession, and that it is but a disappointment.

Foreign writers upon insurance, whose doctrines form the greatest part of our law on this subject, certainly do not treat of insurance on profits as a matter inconsistent with the true nature and design of such a contract; and where it is spoken of by them as a species of insurance which cannot be made, this latter doctrine will be found to be referable to the positive institutions of different nations, who have thought it wise to prohibit it. Roccus, an Italian jurist, inquiring how goods that are lost are to be valued, has in his Notabilia de Assecurationibus, No. 3. this passage: "Dictingue aut merces fuerunt æstimatæ pro certa quantitate tempore contractus assecurationis, et tunc non sumus in dubia quia dicta quantitas æstimata solvenda est; aut assecuratio fuit facta pro asportandis mercibus salvis Romam, et tunc æstimatio inspicenda est Romæ. Aut assecuratio fuit facta simpliciter, de solvendo æstimationem seu valorem mercium, in casu periculi, si navis perierit, & tunc inspici debet tempus obligationis, & prout tunc valebant, debet fieri æstimatio, et sic damnum quod assecuratus patitur in amissione rei, non lucrum faciendum consideratur." And for this he cites Santerna, a Portuguese lawyer, de Assecurationibus, part the 3d, num. 40. and 41. in which book there is a long disquisition to shew that in this latter case the profit on the goods is not to be paid, but only the value at the time of the insurance. So that it seems the insurance of profits is so far from being inconsistent with the nature of insurance, that e contra Santerna thinks it necessary to shew by argument that the profit is not to be considered in all cases; and that where the assurance is made simpliciter, then lucrum non spectatur. And Stracca, another Italian lawyer, agrees with Santerna in his Gloss, No. 6. In France, such assurances were unlawful; but that depends according to Valin on the ordinance of the marine, which also forbids insurance upon freight: and the reason given by Valin for making those ordinances with respect to the one and the other is the same. So in Holland it appears from Bynkershoek's Quæstiones Juris Privati, book 4. c. 5. that such insurances cannot be legally made there; but that is by the positive laws of that country; notwithstanding which the practice has so generally obtained to insure expected profits, as that in a case, he there states, the majority of the Judges of the Court, where the question arose, determined in favour of the assured; and those who opposed that decision rested their opinions on the positive laws of the country, and not on such contracts being contrary to the nature of insurance.

In this country, there is no law forbidding such insurance, unless it could be shewn that the insurer had no interest in the profits, or that from its nature it must be a mere wager, so as to bring the case within the stat. 19 Geo. 2. And that they are not considered as contracts inconsistent with the general nature of insurance is proved by the instance put of an insurance on freight; which, as was very truly argued at the bar, differs only from the case now before us in the same degree as a return of capital vested in shipping differs from a return of capital vested in merchandize; and by the cases of Grant and Parkinson, in Marshall, 111, and Park, 267. which was an insurance on the profits of a cargo of molasses; and of Henrickson and Walker, and Henrickson and Margetson, Mich. 1776.[23] The authority of Grant and Parkinson as applied to this case has been attempted to be gotten rid of by observing that the thing insured there was the profits of a specific cargo; but in that respect the two cases do not differ: for this is an insurance on a specific cargo; and we have no ground to say, that the profits of a cargo to be exchanged in the African trade, from which exchange the profits will arise, are not, to use the expression of Lord Mansfield in Grant and Parkinson, pretty certain; admitting for the sake of the argument, which it is not necessary for us now to determine, that in some mercantile adventures there may be so much uncertainty as to the profits, as to make it not possible to insure them without the policy being a wagering contract. This, however, we cannot presume of the returns to be made from an adventure undertaken according to a long established course of trade like that in question, in which numbers have been engaged to great advantage for a continued succession of years.

It has been objected to this sort of insurance, that the subject having no physical existence cannot be insured. This objection would hold against insuring freight and bottomree and respondentia interest. Again, that the goods might be going to a losing market, in which case the assured would gain by the loss of his goods: but if that were the case, it would be evidence on non assumpsit, as it would prove either that the plaintiff was not damnified as to profit by the loss of the goods; or that at the time of the loss, he had no interest in the thing insured. It was further objected, that there can be no average nor abandonment: but that objection does not hold in the present case; for if there be only a partial loss, the assured will only be liable to pay for the expected profits on the goods lost, and there may be an abandonment of the profits by abandoning the goods from whence the profits are to arise. And as to general average, there would be no difficulty in the case of a valued policy: and in the case of an open policy the difficulty would be no greater than in ascertaining the damages in case of loss; the impossibility of doing which in

[23] The note of these cases, read by Mr. Justice Lawrence, is omitted.

every case will not prove that an insurance can be made on profits in no case.

A considerable time has elapsed between the first and second argument of this case in consequence of a writ of error in the Exchequer Chamber in another case, the decision of which might have had weight in favour of the defendant had it been determined otherwise than it has been. The grounds of that decision we are not acquainted with, so as to say whether they will support this case; but as that determination does not militate with the opinion Mr. Justice GROSE, MR. Justice LE BLANC and I have formed, and I may add that of Lord KENYON on hearing the first argument, we do not think it fit that we should longer delay the judgment of the Court.

Postea to the plaintiff.

LUCENA v. CRAUFURD.

(House of Lords, 1805. 2 Bos. & P. N. R. 269.)

[The following statement of facts and summary of the history of this famous and much litigated case—in King's Bench (1798) 8 T. R. 13; in Exchequer Chamber (1802) 3 Bos. & Pull. 75; in House of Lords (1805) 2 Bos. & Pull. N. R. 269, (1808) 1 Taunt. 325—is taken from the opinion of Denio, C. J., in Herkimer v. Rice (1863) 21 N. Y. 163:]

"The action was on a marine policy upon several vessels and their cargoes, on a voyage from St. Helena to a port in Great Britain. The plaintiffs were commissioners appointed by the crown pursuant to an act of Parliament and to certain orders in council; and their general duty was to take into their possession and under their care all ships and cargoes which should be brought into the kingdom pursuant to the act of Parliament and orders referred to, and to manage, sell and dispose of the same to the best advantage, according to such instructions as they should, from time to time, receive from the crown. The case was, that the French Republic had, in the year 1795, invaded Holland, then on terms of friendship with Great Britain, with a view to revolutionize the government and make it a party, in the French interest, to the war which France was then waging with the principal European states. The course of the British government was to seize upon all the Dutch vessels which their cruisers could find at sea, and to bring them into a British port, to await such disposition of them as the course of events in Holland and the policy of the British government should require; it being assumed that the Dutch merchants and a part of the population were favorable to England and its allies and hostile to the French, but that the government of that country might be coerced to join France in the war. The act of Parliament and the orders in council established that pol-

icy, and the plaintiffs were appointed to deal with the captured vessels upon their arrival at a British port; but it was not contended that they had any concern with them until such arrival. The ships insured, eight in number, were captured pursuant to this system, and the commissioners, on receiving advices that they had sailed from St. Helena for England, effected the policy sued on; and, several of them being lost on the voyage by the perils of the sea, the action was brought against the underwriters to recover the amounts insured. The only material question was, whether the plaintiffs had an insurable interest. The King's Bench gave judgment for the plaintiffs, holding that they had such an interest as trustees of the parties who might eventually be interested, likening the case to that of trustees, consignees and agents for prizes.

"On error to the Exchequer Chamber, this judgment was affirmed, after three arguments, by eight judges against Chambre, J., who dissented. The principal objection to the recovery related to the doubtful and contingent nature of the interests represented by the commissioners, who had no concern with the ships until they should arrive; and it was argued that they might be prevented from arriving in a condition to be subject to the control of the commissioners, by various causes, independent of the perils insured against. They might be given up by the government, or they might vest provisionally in the crown by the occurrence of a state of war between England and the States of Holland, in either of which cases the agency of the commissioners, it was argued, would not attach. In the opinion, concurred in by a majority of the judges, the rule was stated which they said had been laid down by the counsel for the commissioners, and that no exception had been suggested to it, viz.: 'That where nothing intervenes between the subject insured and the possession of it, but the perils insured against, the person so situated may insure the arrival of such subject of insurance, for he has an interest to avert the perils insured against.' The opinion of the dissenting judge went upon the ground that the commissioners had no power of disposition for the benefit of any one except under the discretionary direction of the Privy Council, and that it could not be ascertained until such orders were received who were the beneficiaries of the trust confided to those officers. But the learned judge admitted the rule as to interest to be sufficiently broad to cover the rights of the creditors in the present case. 'There appears to me,' he said, 'to have been great propriety in establishing the contract of insurance, whenever the interest declared upon was, in the common understanding of mankind, a real interest in, or arising out of the thing insured, *or so connected with it as to depend on the safety of the thing insured and the risk insured against,* without much regard to technical distinctions respecting property; still, however, excluding mere speculations or expectation, or interest created no otherwise than by gaming.'

"When the case came before the House of Lords, the twelve judges

were called upon to answer certain questions, and principally whether the commissioners had an insurable interest. Eight judges, including Sir James Mansfield, chief justice of the Common Pleas, were of opinion with the plaintiffs, and two, Chambre and Laurence, thought the interest too uncertain to be the subject of an insurance. In the answer of Chambre, J., he said there was no other foundation for the claim of interest than a mere naked expectation of acquiring a trust or charge respecting the property, without a scintilla of present right, either absolute or contingent, in possession, reversion or expectancy, in the proper legal sense of the word; that if they could insure these vessels, they could insure any ships belonging to the provinces of Holland which were out at sea. He contended that the destination of the insured vessels for a British port might be changed at any time at the pleasure of the king; that he might give them up to the Dutch owners, and that the property might be changed by the commencement of hostilities with the Dutch government. Hence, he thought the supposed interest altogether too vague and uncertain. In the answer of Laurence, J., who dissented from the majority on nearly the same grounds, he undertook to state the nature of a contract of insurance, which, he said, was to protect men against uncertain events which might be in any wise of disadvantage to them, 'not only these persons to whom positive loss may arise by such events occasioning the deprivation *of that which they may possess,* but *those also* who, in consequence of such events, *may have intercepted from them the advantage of profit,* which, but for such events, they would acquire according to the ordinary and probable course of things.' On these grounds he thought a contract of insurance might extend to protect every kind of interest that might subsist in, or be dependent upon, things exposed to the dangers to which maritime ventures were subjected." * * *

Lord ELDON.[24] * * * The effect of the averment of interest in this count, as it seems to me, is, that the commissioners had a right and an interest, as such commissioners, to make an insurance for their use, benefit and account, as such commissioners, at the time when the ships were at St. Helena, when they sailed from thence, and till the time of the losses. And the averment is not only predicated of all the ships, but of each of them at each of the times mentioned in this part of the declaration. It is averred that the ships sailed from St. Helena upon the 2d of July 1795 for London; that the Houghly, with part of her cargo, was lost by perils of the sea on the 1st of September 1795; and the Surcheance and her cargo on the 5th of September; that the Dordrecht was disabled on the 13th, but was carried into Ireland and sold there, and her cargo brought to London; and that the Zeelelye was lost on the 29th of September, which was after the declaration of hostili-

[24] Only the opinion of Lord Eldon is given, and that only in part The omitted portion refers to the state of the pleadings.

ties between this country and the United Provinces, which took place on the 15th of September, and which stamped the character of enemies' property upon the Zeelelye from the date of that declaration. As I understand the case, the verdict has been taken for damages, computed upon the principle that the commissioners had a right to recover in respect of all these ships and their cargoes, and not merely upon some of them. If, therefore, it should turn out that they have only a right to recover upon some, and that it should appear upon the record that they have recovered upon all, there will be a miscarriage in the course of justice. [His lordship then stated the bill of exceptions.]

The questions now are: First. Whether upon the matters disclosed on the first count the commissioners had an insurable interest in any of the ships and cargoes upon which they have recovered? Secondly. If they had an insurable interest in any, whether there are not some on which they had no such right? Whether your lordships shall come to the conclusion that they have no right to recover upon any of these ships and cargoes, or to a more limited conclusion, and take such steps as may be in your power to collect the true result of the proceedings which have been had, it seems to me due to the importance of the subject to enter into some of the topics which have been discussed at the bar; and to determine the real character of the Plaintiffs which led to the existence of their commission. The orders of Council, referred to in the bill of exceptions, applied to a state of this country with relation to the United Provinces and their inhabitants, which I may represent as perfectly unparalleled. The United Provinces had been reduced under the yoke of France, then at open war with this country; whether finally reduced or not was the question. The former Government and a great part of its subjects were adverse to France and attached to this country; many of the inhabitants had proposed to resort to this country for protection and some had come here with their property. It was thought a humane policy not only to protect the individuals, but to bring into the ports of this country Dutch property bound to Holland, for the benefit of those who might ultimately turn out to be entitled. On the other hand, in case a war should take place the property of the United Provinces and of its inhabitants would become the property of the crown, and subject to be disposed of by his majesty. Yet even in that event it appears to me to have been taken for granted that many Dutchmen might acquire a friendly character, and be entitled to be considered as owners of the property taken, and to whom therefore it would have become liable to have been restored. It was impossible, however, to make a provision of this sort in the exercise of his majesty's prerogative, since such ships and cargoes could not enter British ports consistently with law. The power of the Legislature therefore was called

in; but it may be observed, that so far as related to detaining Dutch ships and cargoes at sea, by the force of the state the prerogative of the crown was fully sufficient, and the act appears to have been studiously framed to avoid any interference with that prerogative. Accordingly, the power of the commissioners is expressly limited to ships and goods that have actually come, or been brought into the ports of Great Britain.

All the directions relative to bringing these ships into port were given in the legitimate exercise of the king's prerogative for the protection of the state and its allies; and it appears to me, as it has done to the learned Judges unanimously, that there is nothing in this act of parliament which touches the prerogative while the ships and cargoes were at sea, or even in the ports of Ireland; and that it was competent to the crown from the moment they were taken possession of to restore them to the Dutch owners or the Dutch government, or to deal with them in any manner which should be thought fit; for the power of the commissioners never attached till they actually came into a British port. If this be the law, it is a direct negative of that which the averment seems in a general sense to import, and those averments can only be true in this sense, that the commissioners had a power to dispose of the ships and cargoes if they happened to come into port, and his majesty's orders did not intervene to prevent their being brought in, or hostilities did not intervene to prevent their being brought in, or to change the characters of the owners. For it appears to me, that even though the ships and cargoes were taken possession of by the commissioners, the act was not intended to operate upon them if hostilities should take place. With respect to those brought in after hostilities they would be ships in the hands of the king's officers, to be condemned as seized by the force of the state, and distributed according to his majesty's bounty. It could not be the intention of the act to affect the rights of the crown. It has indeed been stated by one of the learned Judges, that these commissioners might have sold the ships. With great deference to the authority of that learned Judge I must state to your lordships my humble but confident opinion, that they could not have sold them; and I go much further; the commissioners could not have made a good title, even if they had been brought into an English port. Among the subjects of this country indeed who are bound by an English act of parliament they might have made a good title. But if a ship be taken by hostile force, the title to that ship as against foreigners cannot be changed by any act of local legislature, but the ship must be condemned in a court proceeding according to the law of nations on rules binding not only on the subjects of the country where the court is held, but on foreigners who are not so. So far therefore from these commissioners having a power to sell the ships in

transitu, they could never make a good title against the Dutchman at sea, unless the person having possession could show the condemnation of a prize court.

These principles are strongly illustrated by the evidence. The moment hostilities took place the property was condemned as prize. The power of the commissioners could never have attached upon it in the hands of the king, nor could they have any authority to deal with it, unless the king had thought proper to grant it to them. With respect to the ships in the ports of Ireland, he expressly constitutes them prize agents; and with respect to those brought into this country and condemned, he authorizes them to deal with the proceeds in the manner they had been instructed to deal as commissioners, and according to such instructions as they should thereafter receive. But I state it with great confidence, though I hope with proper humility, as my clear opinion, that after the declaration of hostilities the commissioners neither did deal, nor had a right to deal with the property as commissioners. His majesty having a title to it makes them his agents, and points out to them in what manner they shall exercise that agency; directing that it should be in the same manner as if they had derived their title under the commission, and not under their special appointment as prize agents. This is not a case in which there is any averment of an interest in these commissioners beneficial to themselves, and the question is, Whether the power, or faculty, or right of concern and management which these commissioners might or might not have had, which they would have had if these ships had come into port, and which they might have ceased to have the moment after, be the subject of a legal insurance? Since the 19 Geo. 2, it is clear that the insured must have an interest, whatever we understand by that term. In order to distinguish that intermediate thing between a strict right, or a right derived under a contract, and a mere expectation or hope, which has been termed an insurable interest, it has been said in many cases to be that which amounts to a moral certainty. I have in vain endeavored however to find a fit definition of that which is between a certainty and an expectation; nor am I able to point out what is an interest unless it be a right in the property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party. In the 19 Geo. 2, as well as in every other statute and charter relating to insurance, the objects of insurance are plainly described to be ships, cargoes, wares, merchandises, or effects. One or two later statutes mention property; but as to expectation of profits and some other species of interest which have been insured in later times, there is nothing to show that they were considered as insurable.

I do not wish that certain decisions which have taken place since the 19 Geo. 2 should be now disturbed, but considering the caution with which the Legislature has provided against gambling by insurances upon fanciful property, one should not wish to see the doctrines of those cases carried further, unless they can be shown to be bottomed in principles less exceptionable than they would be found to be upon closer investigation. Lord Kenyon, in Craufurd v. Hunter, considered the 19 Geo. 2 as a legislative declaration that an insurance might have been effected before that statute without interest. It is with great deference that I entertain doubts on that subject. Ld. Ch. Baron Comyns, in the case of Depaba v. Ludlow, Com. 360, speaking of this statute says, that it was an act to affect the form of the policy; and Lord Hardwicke has said the same in two cases, The Sadlers' Company v. Badcock, 2 Atk. 554, and Pringle v. Hartley, 3 Atk. 195. In the latter of which he distinctly says, that the words "interest or no interest" were meant only to dispense with the proof of interest on the trial. If then a policy with the words "interest or no interest" were stated in a declaration, and those words meant that there should be a dispensation with the proof of interest, there would be something like an averment on the one part and an admission on the other that there was an interest. I cannot conceive how such decrees could have been made in courts of equity as were made there previous to the 19 Geo. 2, if an insurance could have been made without interest, for no court of equity could relieve against the effect of a contract valid in law. But if the words "interest or no interest" amounted to an agreement to dispense with the proof of interest, the principles upon which those decrees proceeded may easily be accounted for. If the insurer, having admitted an interest which he supposed capable of proof, afterwards discovered that no interest existed, he might state to a court of equity that he had been taken by surprise in his admission, and the policy would be ordered to be delivered up.

There is some strange language to be found in our books respecting wagering and valued policies, the latter of which, though frequently in effect wagering policies, have been permitted, because it has been supposed that the convenience of them is greater than would result from the prohibition of them. But the language of all courts of justice has been extremely careful lest the permission of valued policies should introduce a species of gambling policies. With respect to foreign ships, the averment of interest has been dispensed with, not because insurance on them could be made without interest, but on account of the difficulty of proof. But whatever may have been the common law, the 19 Geo. 2 has prescribed what should be the law thereafter, and all courts of justice are bound to follow up the spirit of that act. If this power and faculty of future concern be an insurable interest, we ought

at least to take care not to extend to such interest a protection that would be denied to policies of a more solid nature, lest that sort of wagering in policies should grow up, which has of late been extending itself considerably. It has been said, that the commissioners either are or are not like trustees, consignees, or agents, and that they had as good an insurable interest as the captors in the Omoa case, or a creditor on the life of his debtor. If the Omoa case was decided upon the expectation of a grant from the crown, I never can give my assent to such a doctrine. That expectation, though founded upon the highest probability, was not interest, and it was equally not interest, whatever might have been the chances in favour of the expectation. That which was wholly in the crown, and which it was in the power of his majesty to give or withhold, could not belong to the captors, so as to create any right in them.

I am far from saying, however, that that case might not have been put upon other ground. The captors not only had the possession, but a possession coupled with the liability to pay costs and charges if they had taken possession improperly. There was also a liability to render back property which should turn out to be neutral, and a liability as agents to act for the king as their principal; and I should be disposed to say, that the king had an insurable interest as the person who had the jus possessionis. His right indeed was liable to be affected by a sentence of the Court of Admiralty. But as the insured is often entitled to consider the property as gone the moment the capture takes place, so I think that the king may be considered as against all the world as having an interest in the property before condemnation for the purpose of insuring. With respect to the case of a trustee, I can see nothing in this case which resembles it. A trustee has a legal interest in the thing, and may therefore insure. So a consignee has the power of selling, and the same may be said of an agent. I cannot agree to the doctrine said to be established in the courts below, that an agent may insure in respect of his lien upon a subsequent performance of his contract, nor can I advise your lordships to proceed without much more discussion upon authority of that kind. There are different sorts of consignees: some have a power to sell, manage and dispose of the property, subject only to the rights of the consignor. Others have a mere naked right to take possession. I will not say that the latter may not insure, if they state the interest to be in their principal. But in the present case the commissioners do not insure in respect of any benefit to themselves, nor of any benefit to the crown, or to any other person or persons stated on this record; they insure merely as commissioners, and if they have a right so to insure it seems to me that any person who is directed to take goods into his warehouse may insure; and that there is nothing to prevent

the West India Dock Company from insuring all the ships and goods which come to their docks.

If moral certainty be a ground of insurable interest, there are hundreds, perhaps thousands, who would be entitled to insure. First the dock company, then the dock-master, then the warehouse-keeper, then the porter, then every other person who to a moral certainty would have anything to do with the property, and of course get something by it. Suppose A. to be possessed of a ship limited to B. in case A. dies without issue; that A. has 20 children, the eldest of whom is 20 years of age; and B. 90 years of age; it is a moral certainty that B. will never come into possession, yet this is a clear interest. On the other hand, suppose the case of the heir at law of a man who has an estate worth £20,000. a-year, who is 90 years of age; upon his deathbed intestate, and incapable from incurable lunacy of making a will, there is no man who will deny that such an heir at law has a moral certainty of succeeding to the estate; yet the law will not allow that he has any interest, or any thing more than a mere expectation. I am the more surprised at the doctrine which has been advanced upon this subject, recollecting the case of a gentleman who had been in a state of incurable lunacy for many years, in the time of Lord Bathurst, who was then assisted by no less a man than Lord Chief Justice De Grey. Certain individuals filed a bill to perpetuate the testimony of their being heirs at law, and next of kin. Lord Thurlow, then attorney-general, demurred to that bill, and the ground of his demurrer was, that though it was as morally certain as anything could be, that those individuals would succeed to the property, yet as the whole of it was in the lunatic, no part of it could be in any body else, and therefore their moral certainty raised no title in a court of justice. One of the persons to whom I am alluding concluded with these words: "Courts of justice sit here to decide upon rights and interest in property; rights in property, or interest derived out of contracts about property. They do not sit here to decide upon things in speculation. Speculative profits are nothing." I send my ship to India; I expect profit from the voyage; if the ship is lost, my expectation is defeated; but of those expected profits the law can have no consideration; and I am sure that Lord Ch. J. Willes did not hold that such expectations might be regarded in the case of Pole v. Fitzgerald, Willes, 641; the doctrines of which case have been wounded to the quick by the representations made of them in subsequent cases; and among the rest in the first volume of Burrow; which representations are most inaccurate, if they are meant to convey, as the result of that case, that where there is a contract under which a party is to receive profit, and such profit so secured by contract may be affected by some contingency connected with the voyage, it is insurable. I do not assert that it is not insura-

ble; but I cannot accede to that which has been stated as part of the doctrine upon this subject—that unascertained profits, which may or may not be made, may be insured.

The present case, however, assumes not only that a man may insure unascertained profits from his own losses, but that he may insure profits to arise out of ships and goods, which he has not, and which he never may have in his possession, and from the management of which he never can obtain any profit. If I were bound now to state my opinion judicially upon this first count, I should be obliged very strongly to say, that the claims of the plaintiffs could not be supported; but I do not think it will be necessary for me to say, that I am sure that it cannot be supported to the extent to which damages have been found, for the Zeelelye having been lost after the declaration of hostilities, unless I mistake the act and commission altogether, she was not a ship which the plaintiffs could have taken into their possession as commissioners; they have therefore sustained no loss as commissioners with respect to that ship; and it will be essentially necessary that a distinction should be made in the proceedings in the court below with respect to the different ships, in order that the damages may be properly computed. It appears to me that the proper mode of proceeding will be, that we do award a venire de novo for this purpose. The whole record will then be carried down, and the case will be open, and all the different interests which are averred in the other counts. As the matter now stands, I think it impossible to affirm this judgment. With respect to the conduct of the underwriters I have said nothing. Courts of justice have no right to tell men whether they are acting honestly or dishonestly. It is the duty of a court to say whether they have acted legally. To that consideration I have entirely confined myself. * * *

The Lord Chancellor then moved that a venire facias de novo should be awarded, which was ordered accordingly.

HANCOX v. FISHING INS. CO.

(Circuit Court of the United States, D. Massachusetts, 1838. 3 Sumn. 132, 1 Law Rep. 5, Fed. Cas. No. 6,013.)

Assumpsit on a policy of insurance. The policy was as follows: "The president, &c., of the Fishing Insurance Company, do by these presents, cause Z. Cook, Jr., for P. Hancox, to be insured lost or not lost one thousand dollars on clothes and the proceeds thereof, on board schooner Emily, at and from New York, on the first day of September, at noon, to the South Seas, and elsewhere, for the purpose of taking seals and oil, and to continue to the termination of her voyage at any port in the United States, with general liberty and the privilege of taking skins and procuring refresh-

ments, and information and any thing else, at any port or place that the master may think for the benefit of the voyage, entitled to the same average as outfits and cargo." Liberty was also given to ship home skins by any other vessel or vessels. In case of loss, the policy was to be sufficient proof of interest. The premium was eight per cent., per annum, warranting eight per cent. The clothing and proceeds were valued at the sum insured. The policy contained the usual perils in Boston policies. The declaration alleged a loss by the perils of the seas. Plea, the general issue. By consent of the parties, a verdict was taken for the plaintiff, for $1200, subject to the opinion of the court upon a statement of facts admitted by the parties; and the verdict to be altered and amended according to the opinion of the court.

The facts will be found embodied in the opinion of the court.

STORY, Circuit Justice. The questions arising upon this policy are of a somewhat novel character. The insurance is upon "clothes and the proceeds thereof," on a sealing voyage for seals and oil, in the South Seas, and back to the United States. In the course of the voyage, the schooner was shipwrecked on Refreshment Island, one of the group of the Tristan d'Acunha Islands, in the South Seas; and the vessel and cargo, then consisting of about ninety barrels of whale and elephant oil, and thirty-six seal-skins, were totally lost, with the exception of the thirty-six seal-skins, about fifty barrels of whale oil, worth $600 or $700, and one hundred and eighty-two skins, worth about $2600, which had been previously sent home in another vessel, and had safely arrived. According to the usage of this trade, it is customary to take on board clothing, bedding, and stores of all kinds for the use of the crew during the voyage, which are dealt out and sold to the crew, according to their wants during the voyage, by the master, and they are charged against the crew accordingly. They are sometimes put on board by the owner, and sometimes by other persons; and upon all such sales, the master is entitled to a commission. The crew in these voyages, receive a certain portion of the profits and proceeds of the oil and skins taken during the voyage, in lieu of wages. Their shares of the proceeds of the voyage are received, and sold by the owners, and are liable for all advances made to them by the owners, the master, and the shippers of clothes during the voyage, in the following order; first, the advances of the owners are to be paid; next, those of the master; and lastly, those of the shippers.

In the present case, the plaintiff was a shipper of clothes to an amount as invoiced, exceeding $1000, under the usage; and it was agreed, that they should be taken on board and dealt out by the master to the crew, as they should need them; and be charged to them accordingly. The master was to receive a commission of

seven per cent. for his services. Accordingly, in the course of the voyage, and before the shipwreck, the master had dealt out and sold to the crew about $950 worth of the clothing; and there remained at the time of the shipwreck, unsold, about $50 or $100 worth of the clothing, which was then lost. It seems, that the shares of the crew, in the proceeds of the cargo sent home, were insufficient to pay the advances due to the owners and master; and therefore, nothing could be obtained from that source by the plaintiff. Some of the crew ran away; others of them have gone to places unknown; and others have no known places of residence. Upon receiving information of the loss, the plaintiff, through his agent, abandoned to the underwriters for a total loss. Three other policies had been effected by the owners of the schooner Emily, on the schooner and her outfits, for the same voyage; upon which also, it seems, abandonments have been made, and they have received payment, as for a total loss.

Such are the general facts; and upon these the question arises, whether the plaintiff is entitled to recover for a total loss; if not, whether he is entitled to recover for a partial loss. That he is entitled to recover the amount of the clothing which actually perished in the shipwreck, does not seem to me a matter upon which there can be any real dispute. No point of this sort was made at the argument; and I do not well see how any can be made. The real question turns upon the right to recover for a total loss. That this was a policy upon a real interest is clear; and the policy attached upon that interest to the full amount insured. The point of controversy is, whether the policy upon the goods sold had terminated at the time of the shipwreck. The argument for the plaintiff is, that, upon the construction of the policy, it was either (1) a policy upon the clothing, until sold to the crew; or (2) it was a policy upon the clothing, until it was sold, delivered, and paid for. If the former be the true construction, then it is said that by the sales to the crew the policy pro tanto was discharged. If the latter be the true construction, then it amounts in effect to an insurance upon the seamen's wages; for their shares of the proceeds are in the nature of wages; and the policy of the law prohibits such an insurance. The terms of the policy, construed without any reference to the usage of the trade, would not involve any real difficulty. A policy upon goods and their proceeds is a policy, which covers the original goods, while they remain subject to the risks in the policy; and any other property, in which the proceeds of those goods are invested, when taken on board in lieu thereof, and subjected to the like risks. But it is plain, that such could not have been the intention of the parties to this policy; for though it was contemplated, that the clothing should be sold, it was never contemplated, that the proceeds should be, in a strict sense, specifically invested in any other property during the voyage.

The usage of the trade, which must be taken into consideration in construing all policies, fully explains this whole matter. Stripped of its artificial texture, the real object of the policy was to cover the risks of the shippers, arising from the loss of the goods, or the frustration of the voyage, by any of the perils insured against. The goods were to be put at risk. They were to be sold to the seamen; and if the voyage was successful, the shipper confidently looked to the proceeds of the adventure for the due payment of the sales made to the seamen. His reliance upon their personal responsibility was altogether a secondary consideration. As soon as the goods were sold to the seamen, the shipper acquired an interest in the success of the voyage, equal to the sales. It was something in the nature of an inchoate lien, and which became an actual lien upon the shares of the seamen in the proceeds of the adventure pro tanto, as fast as they were obtained. It was not against the marine perils alone to the goods themselves, while they were unsold, that the policy meant to protect the shipper; but also against the hazards of a loss of the voyage and adventure. It is analogous to an insurance upon outfits in a fishing or whaling voyage, where a large portion of the outfits are continually in the process of consumption in the progress of the voyage, and are expected to be repaid out of the proceeds of the adventure. No one ever supposed, that an insurance upon outfits terminated pro tanto with every day's consumption or destruction of the outfits; or, that such a policy did not attach upon the proceeds of the adventure, though they could not be deemed in a strict sense the proceeds of the outfits. This is sufficiently apparent from what was said by the court in Brough v. Whitmore, 4 Term R. 206, and Hill v. Patten, 8 East, 373. An insurance on the ship always includes the provisions of the crew for the voyage; and if the ship be totally lost during the voyage, no deduction is ever made on account of the provisions antecedently consumed, whether the policy on the ship be open or valued. See, also, Haskins v. Pickersgill, 2 Marsh. Ins. 727; 1 Phil. Ins. (1st Ed.) 71, 72; 2 Phil. Ins. (2d Ed.) 43.

The terms of the present policy appear to me clearly to require this interpretation. It is a policy, as has been already stated, on the "clothes, and the proceeds thereof." The word "proceeds" can here have no sensible meaning with reference to the usage of the trade, unless it means the proceeds of the adventure. And then, again, it is added, that the insured is to be "entitled to the same average as outfits and cargo." So that the subject-matter of the insurance in this case is treated by the underwriters themselves as governed by the same principles and entitled to the same average losses as outfits and cargo in such voyages are. The valuation in the policy, also, in a case of this sort, seems to me to point clearly to an understanding of the parties, that the interest insured

and property put on board are to be treated as of the same value during the whole of the adventure, for all the purposes of the voyage. Nor does the policy stop here; for it goes on to provide, that in case of loss the policy itself is to be sufficient proof of interest.

If, then, under the usage of trade and the terms of the policy, we are to treat this as in the nature of a policy on outfits, it would seem that there was no substantial objection in the way of the right of the plaintiff to recover for a total loss under the abandonment. If, in the present case, the vessel had been successful in her outward voyage, and upon the homeward voyage had been lost, with her catchings and other proceeds on board, it would be difficult to resist the claim of the plaintiff to a recovery for a total loss. He would have had a lien on the shares of the seamen in those proceeds, or some interest in the nature of a lien. It seems perfectly clear, that a person having a lien, or an interest in the nature of a lien, on the property on board, has an insurable interest. And it will make no difference in such a case, that he might still have a right to pursue his debtor personally for the debt, on account of which the lien attached. There are many authorities in the books to this effect; and among them are Godin v. London Assur. Co., 1 Burrows, 90; Lucena v. Craufurd, 2 Bos. & P. (N. R.) 294; Hill v. Secretan, 1 Bos. & P. 315; Wolff v. Horncastle, Id. 316; Wells v. Philadelphia Ins. Co., 9 Serg. & R. (Pa.) 103; Seamans v. Loring, Fed. Cas. No. 12,583; Russel v. Union Ins. Co., Fed. Cas. No. 12,146; and the cases of mortgagees, factors, and agents, cited by Mr. Phillips, in his excellent treatise on Insurance. 1 Phil. Ins. (1st Ed.) 27, 41–51; Id. (2d Ed.) pp. 105–122; 2 Phil. Ins. (1st Ed.) 32–34; Id. 41–47, 61.

But, then, it is said, that in this case there were no proceeds, to which the lien did in fact attach; and the mere possibility of a lien is not sufficient to found an interest. This may be true sub modo. But here the question is not, as to an original interest, in the clothing on and for the voyage; for that is clear. But the question is, whether the interest, once having attached to the policy, is gone by the subsequent sales; so that the plaintiff has ceased to have an insurable interest. Now, I am not aware, that any decision has been made, by which it has been established, that an interest ceases to be insurable in the progress of a voyage, simply because it is subject to contingencies, or has not at the moment any thing corporeal or tangible to which it is attached. What, indeed, upon such an interpretation, would become of insurances upon profits, or commissions, or freight, which are in the course of being earned?

One of the difficulties of the argument is in likening an insurable interest to any other interest in property. The truth is, that an insurable interest is sui generis, and peculiar in its texture and operation. It sometimes exists where there is not any present

property, or jus in re, or jus ad rem. Inchoate rights, founded on subsisting titles, unless prohibited by the policy of the law, are insurable; as, for example, freight, respondentia, and bottomry. So it was held by a majority of the judges in Lucena v. Craufurd, 2 Bos. & P. (N. R.) 294, 295. They also held, that, where there is an expectancy, coupled with a present existing title, there is an insurable interest; words which approach very near to a description of the present case. After referring to the definitions by foreign jurists of the contract of insurance, they added: "These definitions clearly embrace a contingent interest, which is subject to the perils of the seas, and for the loss of which a compensation can be made." Lord Eldon, although he differed from some of the views of the majority of the judges, in that case said: "I have in vain endeavored, however, to find a fit definition of that which is between a certainty and an expectation; nor am I able to point out what is an interest, unless it be a right in the property; or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the property." Now, these words are very expressive and direct, as to the nature of the very interest of the plaintiff in the present case. He had a right in the original property, and he had a right founded upon a contract about that property, which has been lost by the contingencies of the present voyage. Indeed, the policy in the present case seems studiously to have provided for the very case, which has happened, by the agreement of the underwriters, that in case of loss the policy itself shall be a sufficient proof of interest.

In regard to another suggestion, that the policy is void as against public policy, because it in effect amounts to an insurance of seamen's wages, a few words may suffice. Assuming, for the purposes of the argument, that an insurance by the seamen themselves on their shares of the proceeds of the adventure would not be good, because they are in the nature of wages, though given in lieu of wages, (a point, upon which I desire to be understood as giving no opinion,) it is a sufficient answer to the argument to say, that the present is not the case of such an insurance. The plaintiff has insured his own interest in the voyage, and not theirs. They may, indeed, in a possible case be benefited by this insurance; but the policy itself is not on wages or on shares in lieu of wages; but simply on the property originally shipped, and upon the proceeds of the adventure, so far as the plaintiff could or might have a lien thereon for his advances to the seamen.

It has been suggested, that the plaintiff has in fact sustained no loss, because for any thing that appears, he may still recover the debts due to him from the seamen; and if so, he has sustained no loss. This objection has already been in effect answered. The question is not, in cases of this sort, whether the party has ac-

tually lost his debt, which, if caused by the insolvency or death of the debtor, would not be by a peril within this policy; but the question is, whether he has lost the security for that debt by the perils insured against, which the underwriters agreed to assume upon themselves. A mortgagee or consignee of property may recover his insurance, if the property mortgaged or consigned is lost in the voyage, although the mortgagor or consignor still remains his debtor and is solvent. Then, again, it has been suggested, that the party insured must not only have an interest in the property at the time when the insurance was made, but also at the time of the loss. This I certainly have been accustomed to consider the established doctrine, not only in the American but in the English courts. It was certainly so laid down by a majority of the judges in the case of Lucena v. Craufurd, 2 Bos. & P. (N. R.) 295; and it has been repeatedly recognized in the American courts. See 1 Phil. Ins. 27; Carroll v. Boston Marine Ins. Co., 8 Mass. 515; Stetson v. Massachusetts Mut. Fire Ins. Co., 4 Mass. 330, 336, 337, 3 Am. Dec. 217; 2 Phil. Ins. 27; Gordon v. Massachusetts Fire & Marine Ins. Co., 2 Pick. (Mass.) 249; Lazarus v. Commonwealth Ins. Co., 5 Pick. (Mass.) 76, 81.

However, in the recent case of Sparkes v. Marshall, 3 Scott, 186, 2 Bing. N. C. 761, 774, 776, there are intimations of opinion by the court of common pleas in England that, if the assured had property in the goods insured at the time of the insurance, no change of interest afterwards, before or after the loss happened, would affect the right of the insurer to recover. Whether this doctrine, so novel and so difficult to be sustained upon principle, will be adhered to, is more than I am able to conjecture. I can only say, that nothing in my judgment in the present case proceeds upon the admission of any such doctrine. And, indeed, it is quite possible, that the court may have intended to restrict their observations to the particular frame of the policy in that case (the words of which are not given in the report), and under the peculiar circumstances there stated. The policy may have been drawn up in general terms, "for whom it may concern."

Upon the whole, my opinion is, that the plaintiff in the present case is entitled to recover for a total loss. This opinion is founded upon the nature and terms of the present policy, operating upon the usage in this particular trade. I consider, that the parties to this policy intended to cover the whole interest of the plaintiff, as a valued interest for the whole voyage, not only in the original clothing, but in the proceeds thereof, when attached by a lien, or a claim in the nature thereof, to the shares of the seamen in the proceeds of the adventure; and further, that the property insured was to be treated, as in the nature of an outfit; and that, if by the perils insured against, the voyage was totally lost and frustrated, then that the plaintiff was entitled to recover the full amount of

the insurance, according to the valuation in the policy, leaving to the underwriters all their rights to salvage, &c., under the abandonment, as in the common cases of an insurance upon outfits, and other special interests.

HOOPER v. ROBINSON.

(Supreme Court of the United States, 1878. 98 U. S. 528, 25 L. Ed. 219.)

Error to the Circuit Court of the United States for the District of Maryland.

The British steamer Carolina came to Baltimore, consigned to James Hooper & Co. They were also her agents while she remained in that port. The plaintiff in error was a member of the firm. Having taken on board her return cargo, the steamer proceeded on her homeward voyage. While in the Chesapeake Bay she was injured by a collision with another vessel, and put back to Baltimore for repairs. She was repaired, and Hooper & Co. paid all the bills and made other disbursements for her. McGarr, the captain, drew on Good Brothers & Co., of Hull, England, for the amount in favor of Hooper & Co., and at the same time directed them to protect the drawees by insurance, which was intended to be done by the policy here in question. The draft bore date Oct. 20, 1872; was for £1,611. 18s. 7d.; was payable in London thirty days after sight; and directed that the amount should be charged "to account for advances for repairs and disbursements of steamship Carolina and her freight, to enable the ship to proceed on her voyage."

The policy of insurance was dated on the 26th of October, 1872, and was to "James Hooper & Co., on account of whom it may concern, in case of loss to be paid to their order." The insurance was "lost or not lost, * * * on merchandise, to cover such risks as are approved and indorsed on the policy." The indorsement set forth the date of the insurance, the name of the vessel, the course of the voyage, the rate of the premium, the amount insured ($8,000), and the remark, "paid advance to cover disbursements and repairs." The names of the agents of the underwriters were affixed. The instrument was a cargo policy. No inquiry was made of Hooper as to whom he was insuring for, and no representation was made by him except as is disclosed in the memorandum indorsed upon the policy. The draft of McGarr was bought by Brown & Sons, bankers, of Baltimore. They transmitted it to their correspondents in London. On the 11th of November, 1872, it was accepted by Good Brothers & Co., and on the 14th of December following they paid it. On the 14th of November, 1872, the steamer foundered at sea. On the 28th of that month notice of the loss was given to the underwriters. On the 6th of

December, in answer to a call for proof of loss and interest, Hooper & Co. furnished the Baltimore agent of the underwriters with the protest and a full account of the items of "outfit and disbursements of the British steamer Carolina." In the statement was the charge, "to cash paid insurance on advances $117.33." On the 15th of January, 1873, the agent in Baltimore drew on the defendants in error, his principals in New York, for $8,012, at five days' sight. The draft was paid on the 24th of that month, and on the 31st Hooper & Co. remitted the amount to Good Brothers & Co. in England. When Hooper & Co. received the draft of the 15th of January, they gave a receipt setting forth that when the draft was paid it would be "in full for claim for total loss of advancements for disbursements, and repairs per steamer Carolina, * * * insured 26th of October, 1872, under policy No. 22,706." The receipt concluded with a promise, upon the payment of the draft, "to assign all our right, title, and interest in the above advances for disbursements and repairs to the underwriters." Hooper said at the time to the agent "that he had nothing to assign." On the 10th of February, 1873, Hooper & Co. executed to Robinson & Cox, the attorneys of the underwriters, the promised assignment, which was a printed form filled up by the agent, "such as is taken in all cases of abandonment for total loss." Hooper then again told the agent "that he had no interest in the matter, but as it was customary, he would sign the paper."

During all these transactions Hooper & Co. were not asked whether they had insured for themselves or for others; whether they had been or expected to be repaid their disbursements; whether any one else was interested in the policy, or for whom they were collecting the insurance. More than a month after the loss had been paid and the money remitted to England, a marine adjuster came from New York to Baltimore "to ascertain who owed Mr. Hooper for advances." A full disclosure was thereupon made by Hooper. The adjuster suggested to him "to write his friends on the other side to return the money." Hooper asked if the underwriters did not get the premium for insurance, and if the vessel was not lost. Being answered in the affirmative, he said he "would not have the face to write to the parties to return the money." No offer has been made to return to Hooper & Co., or to Good Brothers & Co., the premium for insurance. This suit was brought by the underwriters on the 30th of October, 1873, more than nine months after the loss had been paid and the money remitted to Good Brothers & Co., and more than seven months after Hooper's disclosure to the adjuster.

When the testimony was closed on both sides in the court below, the defendant, Hooper, asked the court to charge the jury, in effect, that if they believed the advances and the insurance were made; that the draft on Good Brothers & Co. was drawn, accepted,

and paid; that the steamer was lost; proof of loss and payment demanded; that Hooper then furnished the plaintiffs with the account of his disbursements; that the plaintiffs thereupon paid him and took the assignment without having made any inquiry as to whether he was collecting for himself or for others, and that within a few days thereafter he remitted the money to Good Brothers & Co.,—all as stated in the evidence, the plaintiffs were not entitled to recover. This instruction the court refused to give, and instructed, in substance, that if the jury believed that when Hooper made his claim for indemnity under the policy he produced the account and subsequently gave the receipt and executed the assignment, and that when he received payment and delivered the assignment he had received notice of the payment of the draft upon Good Brothers & Co., given to him to recover his advances, which fact he did not communicate to the underwriters, then the plaintiffs were entitled to recover the amount of the insurance money which he had received. Hooper excepted to the refusal to instruct and to the instruction given. The jury found for the plaintiffs, and judgment was entered accordingly. The defendant then brought the case here for review.

Mr. Justice SWAYNE, after stating the facts, delivered the opinion of the court.

As the facts of which the instruction given was predicated were all indisputable and undisputed, that instruction was equivalent to a direction to find for the plaintiffs. The same remarks apply mutatis mutandis to the instruction asked by the defendant. The case, then, resolves itself in to this: Were the plaintiffs entitled to recover upon the case as presented in the record?

A policy like the one here in question, in the name of a specified party, "on account of whom it may concern," or with other equivalent terms, will be applied to the interest of the persons for whom it was intended by the person who ordered it, provided the latter had the requisite authority from the former, or they subsequently adopted it. 1 Phillips, Ins. § 383.

This is the result, though those so intended are not known to the broker who procures the policy, or to the underwriters who are bound by it. Id. § 384.

One may become a party to an insurance effected in terms applicable to his interest, without previous authority from him, by adopting it either before or after the loss has taken place, though the loss may have happened before the insurance was made. Id. § 388.

The adoption of the policy need not be in any particular form. Anything which clearly evinces such purpose is sufficient.

"It is now clearly established that an insurable interest, subsisting during the risk and at the time of loss, is sufficient, and that the assured need not also allege or prove that he was interested at

the time of effecting the policy; indeed, it is every day's practice to effect insurance in which the allegation could not be made with any degree of truth; as, for instance, where goods are insured on a return voyage long before they are bought." 1 Perkins' Arnould, 238.

This is consistent with reason and justice, and is supported by analogies of the law in other cases. We will name a few of them.

A deed voidable under certain circumstances may be made valid for all purposes by a sufficient after-consideration. A devise to a charitable use may be made to a grantee not in esse, and vest and take effect when the grantee shall exist. The doctrine of springing and shifting uses is familiar to every real-property lawyer. They always depend for their efficacy upon events occurring subsequently to the conveyance under which they arise.

Where the insurance is "lost or not lost," the thing insured may be irrecoverably lost when the contract is entered into, and yet the contract be valid. It is a stipulation for indemnity against past as well as future losses, and the law upholds it.

Where a vessel insured for a stated time was sold and transferred and was repurchased and transferred back within that time, it has been held that the insurance was suspended while the title was out of the assured, "and was revived again on the reconveyance of the assured during the term specified in the policy." Worthington v. Bearse and Others, 12 Allen (Mass.) 382, 90 Am. Dec. 152.

A right of property in a thing is not always indispensable to an insurable interest. Injury from its loss or benefit from its preservation to accrue to the assured may be sufficient, and a contingent interest thus arising may be made the subject of a policy. Lucena v. Craufurd et al., 3 Bos. & Pul. 75; s. c. 5 id. 269; Buck & Hedrick v. Chesapeake Insurance Co., 1 Pet. 151, 7 L. Ed. 90; Hancox v. Fishing Insurance Company, 3 Sumn. 132, Fed. Cas. No. 6,013.

In the law of marine insurance, insurable interests are multiform and very numerous.

The agent, factor, bailee, carrier, trustee, consignee, mortgagee, and every other lien-holder, may insure to the extent of his own interest in that to which such interest relates; and by the clause, "on account of whom it may concern," for all others to the extent of their respective interests, where there is previous authority or subsequent ratification.

Numerous as are the parties of the classes named, they are but a small portion of those who have the right to insure.

Where money is advanced, as in this case, for repairs and supplies to enable a vessel to proceed on her voyage, the lender has a lien, not on the cargo, but upon the vessel, and the amount of the debt may be protected by insurance upon the latter. Insur-

ance Company v. Baring, 20 Wall. 163, 22 L. Ed. 250, and the authorities there cited. If the owner of a vessel, being also the owner of the cargo, or the owner of the cargo, not being the owner of the vessel, procures a third person to make such advances upon an agreement that he shall be repaid from the cargo, and a bill of lading is furnished to him, he has a lien on the cargo for the amount of his advances, and may insure accordingly. Clark v. Mauran and Others, 3 Paige (N. Y.) 373; Dows v. Greene, 24 N. Y. 638; Holbrook v. Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607. The assignment of a bill of lading passes the legal title to the goods. Chandler v. Belden, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193. The assignment of a debt, ipso facto, carries with it a lien and all other securities held by the assignor for the discharge of such debt. The Hull of a New Ship, 2 Ware, 203, Fed. Cas. No. 6,859; Pattison v. Hull, 9 Cow. (N. Y.) 747; Langdon v. Buel, 9 Wend. (N. Y.) 80.

Where a lien subsists either on the vessel or cargo, a third party may pay the debt, and, with the consent of the debtor and creditor, be substituted to all the rights of the latter. Dixon on Subrogation, 163; Garrison et al. v. Memphis Insurance Co., 19 How. 312, 15 L. Ed. 656; The Cabot, 1 Abb. Adm. (U. S.) 150, Fed. Cas. No. 2,277. Where there is neither an agreement nor an assignment, there can be no subrogation, unless there has been a compulsory payment by the party claiming to be substituted. Sandford v. McLean, 3 Paige (N. Y.) 117, 23 Am. Dec. 773.

Recurring to the facts, there are two points upon which we deem it proper particularly to remark:

First. We find no ground for any imputation of bad faith upon Hooper. We think there was no indirection and no purpose of concealment on his part. Before the insurance was effected, the underwriters had a clear right, if they so desired, to know for whom they were asked to insure. Buck & Hedrick v. Chesapeake Insurance Co., supra. They made no inquiry. This excused Hooper from making any communication upon the subject. When the insurance money was paid, although the face of the policy and other facts, patent and notorious, which must have been known to the underwriters, showed clearly that the advances were made, and that the insurance was effected by Hooper, not for himself, but for others, the underwriters were again silent. The draft on Good Brothers & Co. had then been sold, and Hooper had received the money. Thereafter he had nothing at stake but the solvency of the drawees. When the adjuster, more than a month later, made the inquiry, which should have been made before, Hooper had paid over the money. He then made a frank and full disclosure. We see no reason to doubt that if the inquiry had been made earlier it would have been answered in the same way. In this respect the underwriters have themselves to blame rather than

Hooper. The record discloses no ground upon which, ex æquo et bono, he can be called upon to pay back the fund in controversy.

Second. It does not appear in the record to whom the vessel and cargo belonged. There is not a ray of light upon the subject. In that respect the case is left wholly in the dark.

The proof as to who were intended to be insured is that they were Good Brothers & Co., and no one else, though, according to the terms of the policy, payment in the event of loss was to be made to Hooper & Co. The former fact is established by the testimony of Hooper, and there is none other upon the subject. He is unimpeached, and his testimony is conclusive. The inquiry then arises, whether Good Brothers & Co. had any insurable interest in the cargo. It does not appear whether they had or had not. We have suggested several ways in which such an interest may have arisen, and have shown that under the policy in question it would have been sufficient if it had subsisted at any time before the loss was known to them. It may possibly have arisen in other modes. This brings us to the question of the burden of proof. Did it rest upon the plaintiffs or upon the defendant? In order to maintain the plaintiffs' case it was necessary to be made to appear that Good Brothers & Co., the assured, had no insurable interest in the cargo, being the thing insured. Upon both reason and authority, we think the onus probandi was upon the plaintiffs.

It was for them to make out their case. The premium had been paid, the loss had occurred, and the indemnity money had been received by the agents of the assured and paid over to their principals. The plaintiffs claim the right to go behind all this, and to reclaim from Hooper the fund thus received and parted with. It was incumbent upon them to establish everything necessary to entitle them to recover, and they have no right to throw upon the defendant any part of the burden that belonged to themselves. For authorities upon this subject see 1 Greenl. Evid. §§ 34, 35, 80, 81, and the notes. Such is the legal result, nothwithstanding the negative form of the averment, to be established.

But suppose the case were made out as against Good Brothers & Co., and that a recovery could be had if the action were against them, still it by no means follows that the plaintiff in error was liable.

There was laches on the part of the underwriters, or their agents, which is the same thing. Nothing in the record is clearer than that Hooper received the money as the agent of the assured. It was his duty immediately to advise his principals and promptly to pay them. 1 Wait, Actions and Defenses, 252, 255. This latter duty it appears he performed. He had then received no notice of the adverse claims subsequently made, and had no reason to expect it. His parting with the money is proof of his sincerity and honesty.

Under all the circumstances, we think he is entitled to the benefit of the principle which in such cases gives immunity to the agent and refers the party complaining for satisfaction to the principals who have received and hold the money.

There was error in the instruction given by the court to the jury.

The counsel on neither side referred to the state of the pleadings. We have, therefore, not adverted to that subject, but have considered the case as it was argued,—entirely upon the merits.

The judgment of the Circuit Court will be reversed, and the cause remanded for further proceedings in conformity to this opinion; and it is so ordered.[25]

SHAW v. ÆTNA INS. CO.

(Supreme Court of Missouri, 1872. 49 Mo. 578, 8 Am. Rep. 150.)

ADAMS, J. This was an action on a policy of insurance issued by defendant. The plaintiffs filed a second amended petition, to which the defendant demurred; the demurrer was sustained and judgment given thereon against the plaintiffs, from which they appealed to the general term, where the judgment of the special term was affirmed, and the plaintiffs have appealed to this court.

The petition substantially sets forth that the plaintiffs, being the owners of five barges of ice, on the upper Mississippi river, consigned the same to Scherholtz & Klinesmith, of the city of St. Louis, to be sold by them on commission; that the plaintiffs ordered the consignees to have the ice insured, and that the consignees undertook the agency and agreed to have the ice insured for plaintiffs. Instead of insuring the ice in the names of the plaintiffs, they made the insurance in their own names, to indemnify themselves in case of loss, as they would be liable for such loss, having disobeyed the instructions of their principals in not procuring

[25] INSURANCE FOR WHOM IT MAY CONCERN.—Policies made payable "to whom it may concern" or "on account of owner" are of frequent occurrence in marine insurance. It seems that such a designation includes all persons possessing an insurable interest who are contemplated by the person who takes out the insurance. Hagan v. Scottish Union Ins. Co., 186 U. S. 423, 22 Sup. Ct. 862, 46 L. Ed. 1229 (1902); Duncan v. China Mut. Ins. Co., 129 N. Y. 237, 29 N. E. 76 (1891). It seems that the person really interested in property insured under such a policy may take the benefit of the insurance, though the insurance was not authorized, by ratifying the agent's act even after loss. See Hagan v. Scottish Union Ins. Co., supra; Williams v. North China Ins. Co., L. R. 1 C. P. D. 757 (1876). But in a recent English case it has been held that this rule does not extend to unauthorized contracts of fire insurance. See Grover v. Mathews, [1910] 2 K. B. 401. The broad rule obtaining in marine insurance does not, however, cover the case where a person, not within the contemplation of the agent taking out the insurance, subsequently acquires an interest in the property covered by the policy. Boston Fruit Co. v. British & Foreign Mar. Ins. Co. (H. L.) [1906] A. C. 336. See, also, Pacific Ins. Co. v. Catlett, 4 Wend. (N. Y.) 75 (1829).

insurance in their names. One of the barges of ice was lost by a peril provided against, and the consignees assigned the policy to plaintiffs, and this suit was brought by them as assignees for the value of the lost cargo. The alleged ground of demurrer was that the consignees had no insurable interest in the ice.

A consignee, as such, has no insurable interest in goods consigned to him for sale on commission, unless it be to the extent of the commissions or profits he expects to derive from such sales. This he has a right to insure, regardless of any instructions from the consignor. But if he accepts a consignment with instructions from his principals to insure for their benefit, it becomes his duty to insure; and if he neglects to do so and a loss occurs, he is liable to them for the amount. The consignees, in the case under consideration, instead of taking out a new policy in the names of their principals, had the risk entered on their own policy in their own names, as a convenient mode of indemnifying themselves against such damage as they might suffer in not insuring in the names of their principals. I think they had the right to thus protect themselves, and to this end they ought to be considered as interested to the full value of the ice. See Bartlet et al. v. Walter, 13 Mass. 267, 7 Am. Dec. 143; Oliver v. Greene, 3 Mass. 133, 3 Am. Dec. 96; Herkimer v. Keil, 27 N. Y. 163.

After being ordered to insure, the consignees might have considered themselves trustees for the consignors and insured in their own names for them. My impression is that in such case the "positive stipulation of the underwriter to pay the loss to the agent would never be rendered void by the inability of the party really assured to sustain an action on the policy in his own name." See 2 Duer, Ins. 7, § 6. In such case the policy ought to inure to the benefit of the principal, and the agent or consignee be treated as a trustee of an express trust, and the amount of recovery would go to his principal. But whether he is a trustee of an express trust or not, he is nevertheless a trustee for the consignor; and in a suit upon the policy, in the name of the consignee, this may be shown in order to show that he had an insurable interest as trustee for his consignor. The demurrer in this case ought to have been overruled.

Judgment reversed and cause remanded. The other judges concur.[26]

[26] See, further, as to the extent of the consignee's right to insure, Seagrave v. Union Marine Ins. Co., L. R. 1 C. P. 305 (1866); Hill v. Secretan, 1 B. & P. 315 (1798); Wolff v. Horncastle, 1 B. & P. 316, 13 Eng. Ruling Cas. 265 (1798).

As to the rights of bailees in general to insure goods in their possession, see Ferguson v. Pekin Plow Co., 141 Mo. 161, 42 S. W. 711 (1897); Wagner v. Westchester Fire Ins. Co., 92 Tex. 549, 50 S. W. 569 (1899). Such bailee may insure the property in his own name, and upon its destruction recover the full value of the property, holding the excess above his own interest in trust for the owners. See Home Ins. Co. v. Warehouse Co., 93 U. S. 527, 23

SECTION 3.—WHAT CONSTITUTES INSURABLE INTEREST—FIRE INSURANCE

GREVEMEYER v. SOUTHERN MUT. FIRE INS. CO.

(Supreme Court of Pennsylvania, 1869. 62 Pa. 340, 1 Am. Rep. 420.)

THOMPSON, C. J. Four years after the plaintiff had effected an insurance on the property covered by the policy of the defendant on which the suit was brought, he sold and conveyed it to a third party, one Donahoe, and having received a portion of the purchase-money, took a judgment for the balance. Some months after this the property was destroyed by fire. Not having assigned the policy to the purchaser, he now claims to recover on it in satisfaction of his judgment, on the ground that to that extent he has an interest in the property sold and conveyed.

That there is material difference, especially in the law of insurance, between a mortgage and judgment, is beyond question. The able argument of the counsel for the defendant in error, and the authorities cited by them, very clearly show this. In Britton's Appeal, 45 Pa. 172, Strong, J., said: "They [mortgages] are in form defeasible sales, and in substance grants of specific security, or interest in land for the purpose of security. Ejectment may be maintained by a mortgagee, or he may hold possession on the footing of ownership and with all its incidents."

That a mortgagee has an insurable interest on property is so well understood that it would be a waste of time to cite authorities to prove it. Hence it is a very common thing to strengthen the security by insurance of the property for the benefit of the mortgagee. That its purpose is ordinarily a security does not destroy the legality of the insurance. The interest in the property pledged or mortgaged is coextensive with the security it is to satisfy. Being a specific lien, no other property is answerable. It is therefore a specific pledge of definite property, and the mortgagee has necessarily an interest in it.

But a judgment is a general and not a specific lien. Ruth's Appeal, 54 Pa. 173. If there be personal property of the debtor, it is to be satisfied out of that. If there be not, then it is a lien on all his real estate without discrimination, and hence the plaintiff is not interested in the property as property, but only in his

L. Ed. 868 (1876); Murdock v. Insurance Co., 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572 (1889); Waters v. Assurance Co., 5 El. & Bl. 870 (1856).

As to measure of insurable interest of bailor and bailee, see 11 Harv. Law Rev. 520–523.

lien. As was said in Cover v. Black, 1 Pa. 493, the judgment-creditor has neither jus in re nor ad rem, as regards the defendant's property. He has a lien, and the law gives a right to satisfaction out of the property, and that is all. For the same doctrine see Reed's Appeal, 13 Pa. 476, and Conard v. Atlantic Ins. Co., 1 Pet. 386, 7 L. Ed. 189. To these might be added citations of authorities almost without limit.

The result of all this is that the plaintiff, having sold and conveyed the property in question before its destruction by fire, taking only a judgment for the unpaid purchase-money, had no interest in the property when it was destroyed. That the judgment, being for purchase-money, did not draw after it a specific pledge of the land, as in case of a mortgage, is shown by Ruth's Appeal, supra. Like any other judgment, it was a general lien, and to be satisfied by execution of the personal property of the debtor first, and after that out of any other estate as well as that for which it was given to secure purchase-money.

This want of interest in the property was a complete answer to the plaintiff's action, and renders it unnecessary to consider other questions considered in the argument. Judgment affirmed.

ROHRBACH v. GERMANIA LIFE INS. CO.

(Court of Appeals of New York, 1875. 62 N. Y. 47, 20 Am. Rep. 451.)

Appeal from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff entered upon a verdict. Reported below, 1 Thomp. & C. 339.

This was an action upon a policy of insurance, by its terms insuring plaintiff upon "his two framed buildings" situate in the village of Jeffersonville, N. Y. Prior to the 28th June, 1868, the plaintiff had been in the employ of Margaretha Hartmann, and she was indebted to him for his labor and services. On that day they intermarried. On the 13th of the same month she executed and delivered to him an instrument, in writing, of the body of which the following is a copy:

"Jeffersonville, June 30th, 1868.

"I do hereby certify that I owe to John Rohrbach the sum of seven hundred dollars; and, also, twenty-five dollars for each and every month from the fourteenth day of July, 1863, and for every month he may live with me henceforth without any deduction whatsoever, which amount shall be a lien on my property."

She died intestate July 8th, 1868, leaving personal property of the value of $600, and a lot in said village upon which were the buildings in question. The principal value of the premises was

in the buildings. Her indebtedness, other than that to plaintiff, was from $1,200 to $1,400. Her indebtedness to him was about $2,100. Plaintiff continued in the use and occupation of the buildings. Plaintiff obtained the policy in suit in December, 1868. * * * Defendant's counsel moved for a nonsuit on the ground of breach of warranty, and that plaintiff had not an insurable interest. The motion was denied, and defendant's counsel excepted.[27]

FOLGER, J. The plaintiff cannot maintain this action unless he had an insurable interest in the buildings which were the subject of the risk taken by the defendant, and which were destroyed by fire. He seeks to found such an interest upon the instrument in writing, executed by his wife after her marriage to him.

Without entering minutely into a consideration of the effect of the marriage upon her pre-existing obligations and liabilities to him, it is sufficient to say that the instrument executed by her was based upon a consideration adequate to uphold her express promise; that though made by a married woman it was in due form to affect her separate estate; and that though a transaction between a wife and her husband, yet equity would have upheld and enforced it in his favor against her had she lived, and will enforce it against her estate now that she is dead. By it she was an equitable creditor of her estate at the time of the insurance; but he was no more than a general creditor. Though the instrument contains the phrase "shall be a lien on my property," no specific lien was thereby created, and so far as that instrument had effect, no more than a general equitable lien, yet to be enforced and made specific by a judgment in an equitable action. The plaintiff stood thereby in no better plight, so far as having an insurable interest in the buildings, than would have stood a creditor of the deceased wife, who held a judgment only, rendered and docketed against her, which would have become a general lien upon her real property. He did not stand in so good a plight, but for other facts now to be mentioned. She had died after giving the instrument, leaving personal and only this real estate; a person other than the plaintiff had taken out letters of administration thereon; the personal estate was by much insufficient to pay the debts against her; and this real estate, including the insured buildings, would in the due course of administration for a space of at least three years from the granting of letters of administration, be liable to sale for the purpose of meeting her liabilities, and it was the only fund to which the plaintiff could look for payment; the plaintiff was in the possession of the buildings, occupying them at the time of the fire.

[27] Such portions of the statement of facts and of the opinion as do not relate to insurable interest are omitted.

Judgment creditors, if any, would have had a preference in payment from the personal estate (2 Rev. St. p. 87, § 27, subsecs. 3, 4), and of course the lien acquired by the docketing of their judgments could not be disturbed by the application of the administrator for leave to sell the real estate, for the payment of debts, and the obtaining of permission to do so. But yet the plaintiff had a right to compel an accounting by the administrator (Id. p. 92, § 52), and a sale of the real estate (Id. p. 108, § 48), for the payment of his and other debts. Thus the real estate was to a degree subject to the payment thereof, and was in fact from the slender amount of the personal property, substantially all that he could look to for payment. His position was not as good in some respects as that of a judgment creditor, but it was not unlike it; both had a right to have the real estate sold for the payment of their debts; for a certain space of time it could not escape the exercise of that right; and it cannot be said that the interest of a judgment creditor in the real estate, as an interest in property, was greater or nearer than that of the plaintiff. It was more manageable, but not more direct in the end.

The general definitions of the phrase "insurable interest," as given in the text-books, are quite vague and not always concordant. See 1 Arn. Ins. 229; Buny. Assur. 16; Hughes, Ins. 30; 1 Marsh. Ins. 115; 1 Phil. Ins. 2, 107; Sherm. Ins. 93; Pars. Merc. Law, 507; Pars. Cont. 438; Ang. Ins. § 56; Fland. Ins. 342; May, Ins. § 76. The last cited author says that an insurable interest sometimes exists where there is not any present property, any jus in re, or jus ad rem, and such a connection must be established between the subject-matter insured, and the party in whose behalf the insurance has been effected, as may be sufficient for deducing the existence of a loss to him, from the occurrence of an injury to it; and that the tendency of modern decisions is to admit to the protection of the contract, whatever act, event or property, bears such relation to the person seeking insurance, as that it can be said with a reasonable degree of probability, to have a bearing upon his prospective pecuniary condition. While on the other hand, the statement is, that the interest must be founded on some legal or equitable title; and if it be inconsistent with the only title which the law can recognize, it will not be deemed an insurable interest. Marsh. Ins., supra.

But the result of a comparison of the text-writers above cited is, that there need not be a legal or equitable title to the property insured. If there be a right in or against the property, which some court will enforce upon the property, a right so closely connected with it, and so much dependent for value upon the continued existence of it alone, as that a loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest. Thus a mortgagee of real estate, though he hold also

the bond of the mortgagor, has an insurable interest in the buildings; while a judgment creditor of the same mortgagor, his judgment being a lien upon the same real estate and the same buildings, it said not to have an insurable interest in them. The interest of the first is said to be specific, the interest of the latter general. As a general rule the distinction may be sound. But I think it would be difficult to show an appreciable practical difference in the pecuniary result to the two. If the mortgagor and judgment debtor should die, leaving no personal property, and no real estate save that mortgaged, it principally valuable for the buildings upon it, and they should be burned, each must then look to the real estate, the lands alone, for a security for his debt; and if that be insufficient, each must with equal certainty suffer a pecuniary disaster, resulting directly from the fire. What legal reason is there why the one may not, as well as the other, protect himself by a contract of insurance?

In Grevemeyer v. Insurance Co., 62 Pa. 340, 1 Am. Rep. 420, it was held that a judgment creditor, whose judgment was taken for the purchase-money of the property burned, had no insurable interest. See, also, Conard v. Insurance Co., 1 Pet. 386, 7 L. Ed. 189. The reason given is, that his lien was general, and not specific; that he was not interested in the property, but in his lien only. His judgment was distinguished from a mortgage, in that the latter is a specific pledge of definite property, and the mortgagee has necessarily an interest in it; while the judgment is a general, and not a specific lien; so that if there be personal property of the debtor it is to be satisfied out of that; if there be not, then it is a lien on all his real estate without discrimination. And, citing Cover v. Black, 1 Pa. 493, it is said that a judgment creditor has neither jus in re, nor jus ad rem, as regards the judgment debtor's property. It seems to me that the decision there goes very much upon the fact or the assumption that the judgment debtor had other property, real and personal, to look to than the real estate damaged; and that it does not touch the case of a judgment creditor whose only or principal reliance for payment was upon the property destroyed.

That there need not be an existing jus in re, or jus ad rem, is declared by Story, J., in Hancox v. Insurance Co., 3 Sumn. 132–140, Fed. Cas. No. 6,013; and also that the right to pursue the debtor personally does not deprive the creditor of an insurable interest. Id. In Putnam v. Insurance Co., 5 Metc. (Mass.) 386, which was an insurance for a commission merchant upon his expected commission from the sale of a cargo consigned to him to be sold, but in which cargo he had no other ownership or interest, it is said that such an interest in property connected with its safety and its situation, as will cause the insured to sustain a direct loss from its destruction, is an insurable interest. The question is one of

damages rather than title or possession; and it will be enough in general to show such a relation between the insured and the property that injury to it will in natural consequence be lost to him; and it is not necessary to show that the insured is the legal or equitable owner. Wilson v. Jones, L. R. 2 Exch. 139; Buck v. Insurance Co., 1 Pet. 151, 7 L. Ed. 90.

It will be perceived that between the case cited from 62 Pa. St. supra, and the case in hand, there are some features of distinction; here the debtor was dead; there was no longer any personal liability, nor sufficient personal property to satisfy the debt; nor as may be inferred, any other real estate than that insured. A fund for the payment of the debt was to be found only in this estate, and principally in the buildings insured. By force of these circumstances, and by operation of the statutes above referred to, this real estate was for a certain length of time bound for the payment of this debt. As it was bound, as it alone was bound, as there was nought else, nor any person, liable for the debt, it is difficult to see why, in effect, the debt was not as if a specific lien upon this real estate. A lien, in its most extensive signification, is a charge upon property for the payment or discharge of a debt or duty. A specific lien is a charge upon a particular piece of property, by which it is held for the payment or discharge of a particular debt or duty in priority to the general debts or duties of the owner.

It is not the name of the right which gives or refuses an insurable interest; it is the character of the right. A specific lien gives an insurable interest, because a loss of the particular property is at once seen to affect disastrously the specific lienor. But when a right to payment of a debt exists, which can be satisfied only from a particular piece of property, is there not the same result from the same cause? If I have a debt against another, and he have but one piece of real estate from which my debt may be made, and he die leaving no personal estate, though in technical language my lien may not be specific upon that real estate, it is true in fact that there is a specific piece of property from which alone I may hope to satisfy my lien, and which is alone legally bound to satisfy it, and I am practically just like one to whom that piece of real property has been specifically pledged for a specific debt. If the latter, for that he may suffer pecuniary loss by the burning of that real property, has such an interest as that he may insure against that burning, I have such an interest also, and I, too, may insure. The probability—nay, the possibility of the payment of the plaintiff's debt out of the property of the deceased debtor—rested entirely upon the contingency of this real estate remaining without serious impairment in value.

The reports of this state are meagre upon this precise question. In Mapes v. Coffin, 5 Paige, 296, the complainant had levied upon

chattels in the hands of an executor of the judgment debtor, which had been insured by the testator in his life-time, and which were destroyed by fire after the testator's death, and after the levy. The chancellor, in a contest between judgment creditors, gave the avails of the insurance to the creditors who had made the first levy. Perhaps the levy upon the property made a specific lien upon it, and so the case does not much aid us. In Mickles v. Bank, 11 Paige, 118, 42 Am. Dec. 103, the defendants were judgment creditors of a manufacturing corporation, had issued several executions, had sold and bid in personal property, and advertised for sale the real estate. Pending the advertisement, they took out insurance on the buildings and fixtures in the joint name of themselves and the corporation. A few days after, the real estate was sold and bid in by the defendants. After that occurred a fire, with damage to the buildings and fixtures. The insurers repaired the buildings, and paid for the damage by fire to the fixtures. The real estate was never redeemed. There seems to have been no doubt made of there being an insurable interest in the creditors. By advertising the premises for sale, they came nearer making their judgment a specific lien thereupon, though it was still a general lien upon all other like property. In Insurance Co. v. Allen, 43 N. Y. 389–395, 396, 3 Am. Rep. 711, it is said by Allen, J.: "An insurable interest may exist without any estate or interest in the corpus of the thing insured;" "it was enough that" there be "a pecuniary interest in the preservation and protection of the property, and" that one "might sustain a loss by its destruction."

I know of no decision in this state bearing more directly upon this precise question, than that in Herkimer v. Rice, 27 N. Y. 163. The propositions advanced there are sufficient, if sustainable, or if to be taken as authority, to uphold an insurable interest in the plaintiff in the case in hand. Denio, Ch. J., there says: "It is certain that the creditors had no estate whatever in the real property. In a technical sense they had no lien. But they had important rights connected with it, and a pecuniary interest in its preservation. * * * The law does not require that the assured shall have an estate or property in the subject of the insurance. * * * No property in the thing insured is required. It is enough, if the assured is so situated as to be liable to loss, if it be destroyed by the peril insured against. Creditors having no other means of enforcing their debts, but having a direct and certain right to subject the real estate to a sale for their benefit, have an interest as positive and absolute as one having a specific lien, or even as the owner himself. * * * The creditors, whether by simple contract or specialty, under our laws, are parties interested in the real estate, when there is a deficiency in the personal, for they have power to subject it to the payment of their debts."

It is urged that these remarks are obiter dicta, and that the real

question to be decided, and which was decided in the case, was, whether an administrator of an insolvent estate had such an interest in the real estate of his intestate as was insurable. Dicta are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point, are not the professed deliberate determination of the judge himself (Saunderson v. Rowles, 4 Burrows, 2064–2068); obiter dicta are such opinions uttered by the way, not upon the point or question pending (Rouse v. Moore, 18 Johns. 407–419), as if turning aside for the time from the main topic of the case to collateral subjects. I think that no one who reads the opinion in Herkimer v. Rice can doubt that all which was said on the subject of a creditor of an insolvent estate having an insurable interest in the real property thereof, was the professed and deliberate determination of the learned chief justice, not hastily formed nor carelessly expressed, not by the way nor on a collateral question to that awaiting decision, but deemed essential to lead up to the solemn judgment rendered.

The direct question was, indeed, whether an administrator of an insolvent estate might insure its real property. But the reasoning of the opinion shows that this was deemed to depend upon whether the creditors of that estate had such an interest. After stating the question, he says: "It will be convenient to consider, in the first place, whether the creditors themselves have such an interest; and then, whether the administrator can be said to represent that interest, so as to enable him to make the contract for the benefit of the creditors." Again, * * * "the creditors of an insolvent estate are generally numerous, and having no opportunity for concerted action, except through the executor or administrators, they could scarcely ever avail themselves of the advantage of insurance, unless by the agency of the representatives. If the administrators cannot insure, the parties interested, the creditors, will be excluded from a remedy which all other persons having a similar interest possess." He then proceeds to show that an agent or trustee may insure the interest of a party beneficially interested, and that the administrator, though not the trustee of the land, is a trustee of a power over it, such as is recognized by law, and says: "In this case it was sufficiently apparent, from the language of the receipt for the premium, that it was the interest of the creditors which was designed to be covered by the contract; the beneficiaries of the administrator were the parties intended to be protected; the insurers therefore must have seen and known that it was the interest of the creditors * * * which it was the object of the policy to protect, * * * and which was the subject of the contract." There is more to the same effect; and the opinion is based upon the ground that the administrator is the representative of the creditors. Indeed, but for their being creditors, the administrator would have no concern in the land, and the concern he has with it is that they through him may dispose of it for the payment of their

debts. Herkimer v. Rice was a case in which there was full argument and consideration.

I consider it gives reasons as well as authority for the determination of the question now in consideration. It has often been cited as an authority, and at times as authority for the power of an executor or administrator to insure, as having or as representing an insurable interest, holding it for the beneficiaries under the will, or in the intestate's estate. Savage v. Insurance Co., 52 N. Y. 502, 11 Am. Rep. 741. In Clinton v. Insurance Co., 45 N. Y. 454, it is cited by Andrews, J., as holding that when the personal estate of an intestate is insufficient to pay the debts, the administrator has an insurable interest in buildings, on the ground that he is the trustee of a power to sell the land for the benefit of creditors, and that as the interest of the creditors is the subject of the insurance, the administrator may insure for their benefit. The decision is there put aside as not a precedent for that then in hand, inasmuch as in that the personal property was sufficient to pay the debts, and therefore the administrator had no insurable interest.

See, also, Waring v. Loder, 53 N. Y. 581, where it is cited as authority for the proposition, that a mortgagor after he has sold the mortgaged premises has still an interest in it which is insurable, inasmuch as it stands between him and personal liability for the mortgage debt. The distinction is not perceptible, so far as this question is concerned, between a power to obtain indemnity against loss from being obliged to pay a debt owing to another, and against loss from failure to obtain payment of a debt owing to one's self. I conclude that a creditor of the estate of one deceased, whose personal property left is insufficient for the payment of his debts, has an insurable interest in the sole real estate of the deceased debtor, when it is plain that if it is damaged by fire a pecuniary loss must ensue to the creditor thereby. * * *[28]

[28] For other cases holding that the general creditor of a deceased debtor has an insurable interest in the latter's real estate, see Creed v. Sun Fire Ins. Co., 101 Ala. 522, 14 South. 323, 23 L. R. A. 177, 46 Am. St. Rep. 134 (1893); Herkimer v. Rice, 27 N. Y. 163 (1863); Sheppard v. Insurance Co., 21 W. Va. 368 (1883).

RIGGS v. COMMERCIAL MUT. INS. CO.[29]

(Court of Appeals of New York, 1890. 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716.)

Appeal from superior court of New York city, general term.

Action by John S. Riggs against the Commercial Mutual Insurance Company. Defendant issued to Joseph L. Tobias a policy of insurance upon the steamer Falcon for $1,000, loss payable to Andrew Simonds. Tobias was, at the time of effecting this insurance, a stockholder in the Merchants' Steam-Ship Company, which then owned the steamers Sea Gull and Falcon. Simonds, by an indorsement on the policy, directed the insurance company to "pay to John S. Riggs." Plaintiff recovered judgment at special term, which was reversed at general term, and a new trial ordered. 51 N. Y. Super. Ct. 466. * * *

ANDREWS, J. * * * The question whether a stockholder in a corporation, as such, has an insurable interest in the corporate property, which he may protect by an insurance of specific, tangible property of the corporation, is the question now presented. The policy does not disclose the nature of the interest of Tobias in the vessel insured; but this was not necessary, unless required by some condition in the policy. Lawrence v. Van Horne, 1 Caines, 276; Tyler v. Insurance Co., 12 Wend. 507. The policy, if otherwise valid, attached to whatever insurable interest he had, whether as owner or otherwise. What constitutes an insurable interest has been the subject of much discussion in the cases, and is often a question of great difficulty. It is quite apparent that the tendency of decisions in recent times is in the direction of a more liberal doctrine upon this subject than formerly prevailed. May, Ins. § 76. Contracts of insurance where the insured had no interest were permitted at common law, (Craufurd v. Hunter, 8 Term R. 13;) but the manifest evils attending such contracts, and the temptation which they afforded for fraud and crime, led to the enactment in England of the statute 19 Geo. II. c. 37, prohibiting wager policies, and this was followed by the enactment in this state of a similar statute (1 Rev. St. 662) prohibiting wagers. But to prevent the application of the statute to cases of insurance by way of security and indemnity it was provided that it should "not be extended so as to prohibit or in any way affect any insurances made in good faith for the security or indemnity of the party insured, and which are not otherwise prohibited by law." Section 10. It would seem, therefore, that whenever there is a real interest to protect, and a person is so situated with respect to the subject of insurance that its destruction would or might reasonably be expected to impair the value of that interest, an insurance on such interest would

[29] Certain portions of the statement of facts and of the opinion relating to questions of practice have been omitted.

not be a wager within the statute, whether the interest was an ownership in or a right to the possession of the property, or simply an advantage of a pecuniary character, having a legal basis, but dependent upon the continued existence of the subject. It is well settled that a mere hope or expectation, which may be frustrated by the happening of some event, is not an insurable interest.

The stockholder in a corporation has no legal title to the corporate assets or property, nor any equitable title which he can convert into a legal title. The corporation itself is the legal owner, and can deal with corporate property as owner, subject only to the restrictions of the charter. Plimpton v. Bigelow, 93 N. Y. 593; Van Allen v. Assessors, 3 Wall. 573, 18 L. Ed. 229. But stockholders in a corporation have equitable rights of a pecuniary nature, growing out of their situation as stockholders, which may be prejudiced by the destruction of the corporate property. The object of business corporations is to make profits through the exercise of the corporate franchises, and gains so made are distributable among the stockholders according to their respective interests, although the time of the division is ordinarily in the discretion of the managing body. It is this right to share in the profits which constitutes the inducement to become stockholders. So, also, on the winding up of the corporation, the assets, after payment of debts, are divisible among the stockholders. It is very plain that both these rights of stockholders—viz., the right to dividends and the right to share in the final distribution of the corporate property—may be prejudiced by its destruction. In this case the ships were the means by which profits were to be earned, and their loss would naturally, in the ordinary course of things, diminish the capacity of the corporation to pay dividends, and consequently impair the value of the stock. The same would be true in other cases which might be mentioned; as, for example, where buildings producing rent, owned by a corporation, should be burned. It is not necessary, to constitute an insurable interest, that the interest is such that the event insured against would necessarily subject the insured to loss. It is sufficient that it might do so, and that pecuniary injury would be the natural consequence. Cone v. Insurance Co., 60 N. Y. 619.

The question now before us was considered by the supreme court of Iowa in the case of Warren v. Insurance Co., 31 Iowa, 464, 7 Am. Rep. 160. The court, in a careful opinion, reached the conclusion that a stockholder in a corporation had an insurable interest in the corporate property. In Philips v. Insurance Co., 20 Ohio, 174, there is an adverse dictum, but the decision went on another ground. In Wilson v. Jones, L. R. 2 Exch. 139, the action was upon a policy in favor of the plaintiff, a shareholder in the Atlantic Telegraph Company, a company organized to lay the Atlantic cable. The court construed the contract as an insurance of the plaintiff in respect to the adventure undertaken by the company to lay the cable, and it was held that his interest as shareholder was an insurable interest, and likened it to an

insurance on profits. See, also, Paterson v. Harres, 1 Best & S. 336. It is difficult to perceive any good reason why, if a stockholder could be insured on his shares in a corporation against a loss happening in the prosecution of a corporate enterprise, he could not insure specifically the corporate property itself embraced in the adventure, and prove his interest by showing that he was a shareholder.

The question here is, did the plaintiff have an insurable interest covered by the policy? The amount of damages is not in question. Except that the parties have taken that question out of the controversy, the extent of the loss would be a question of fact to be ascertained by proof, and the recovery up to the amount insured would be measured by the actual loss. We are of opinion that the view that a stockholder in a corporation may insure specific corporate property by reason of his situation as stockholder, stands upon the better reason, and also that it is in consonance with the current of authority defining insurable interests in our courts. The cases of Herkimer v. Rice, 27 N. Y. 163, Rohrback v. Insurance Co., 62 N. Y. 47, 20 Am. Rep. 451, and National Filtering Oil Co. v. Citizens' Ins. Co., 106 N. Y. 535, 13 N. E. 337, 60 Am. Rep. 473, sustained policies upon interests quite as remote as the interest now in question. It would be useless reiteration to restate the particular facts and grounds of the decisions in these cases. It is sufficient to refer to them, and to say in conclusion that it seems to us, both upon authority and reason, that the insurance now in question is not a wager policy, but is a fair and reasonable contract of indemnity, founded upon a real interest, though not amounting to an estate, legal or equitable, in the property insured.

The judgment should therefore be affirmed. All concur.[30]

FOLEY et al. v. MANUFACTURERS' & BUILDERS' FIRE INS. CO. OF NEW YORK.

(Court of Appeals of New York, 1897. 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664.)

Appeal from supreme court, general term, Fourth department.

Action by Edward H. Foley and others against the Manufacturers' & Builders' Fire Insurance Company of New York. Judgment for plaintiffs, and defendant appeals. Affirmed.

ANDREWS, C. J. The sole question in this case is whether the plaintiffs had an insurable interest equal to the full value of the incomplete buildings in course of construction on their lot when the fire

[30] For other cases discussing the stockholder's insurable interest, see Ætna Ins. Co. v. Kennedy, 161 Ala. 600, 50 South. 73, 135 Am. St. Rep. 160 (1909); Warren v. Davenport Fire Ins. Co., 31 Iowa, 464, 7 Am. Rep. 160 (1871). See, also, Philips v. Knox Co. Mut. Ins. Co., 20 Ohio, 174 (1851), and Sweeny v. Franklin Fire Ins. Co., 20 Pa. 337 (1853), in which it was held that, under the facts of those cases, the stockholders had no insurable interest.

occurred. It is the contention on the part of the defendant that as the houses were being constructed under a contract by which the contractors were to furnish the materials and build the houses (above the foundations), and to complete them by a time specified, which had not expired at the time of the fire, for a specified sum to be paid within 10 days after their completion, the plaintiffs had no interest to protect in the structures while in their incomplete state, since their destruction by fire would be the loss of the contractors, and not of the owners, whose obligation to build and complete the houses, as the condition of payment, would continue after as before the fire. It may be admitted that the contractors would remain bound by the contract, notwithstanding the destruction of the buildings by fire, and that the owners would not be bound to pay for the work done or materials supplied up to the time of the fire. Tompkins v. Dudley, 25 N. Y. 272, 82 Am. Dec. 349.

The contention of the defendant rests upon a misconception of the insurer's contract, and as to the insurable interest of the plaintiffs in the structures. The defendant, by its contract, undertook to insure the plaintiffs against loss by fire, not exceeding the sum specified, to the "described property," the loss or damage to be ascertained "according to the actual cash value" of the property at the time of the fire. The parties by this contract made the value of the property insured, within the limit, the measure of the insurer's liability. It is an undoubted principle in fire insurance that there must be an insurable interest in the insured, or an insurable interest which he represents in the subject of insurance, existing at the time of the happening of the event insured against, to enable him to maintain an action on a fire policy. This flows from the nature of the contract of fire insurance, which is a contract of indemnity; and, where there is no interest, there is no room for indemnity. The plaintiffs had an interest in the subject of insurance, both at the inception of the contract and at the time of the fire. They owned the land upon which the structures were being erected. They themselves had constructed the foundations of the buildings, and, in describing the property insured, the foundations were specifically named. They were in possession of the premises, and the ownership of the fee of the land on which the contractors were erecting the buildings carried with it the ownership of the structures as they progressed, which, according to the general rule of law, became part of the realty by annexation.

It is not claimed, nor could it upon the evidence be claimed, that there was any intention either on the part of the owners or the contractors to sever the ownership of the structures from the ownership of the land while the work was in progress, or that the contractors should retain title to the materials put into the buildings until their completion. The defendant is compelled to admit that the loss sued for is within the exact terms of the policy. It is conceded that the recovery does not exceed the property loss occasioned by the fire, and,

if counsel can be deemed to have denied that the legal ownership of the structures was in the owners of the land at the time of the fire, the denial is very indistinct, and certainly is not justified by the facts or the law. The defense comes to this: That as the plaintiffs, by their contract with third persons, have imposed upon them the risk and expense of furnishing complete structures, and have assumed no liability until the structures are completed, they had no insurable interest, and have sustained no loss. But the contract relations between the plaintiffs and the contractors is a matter in which the defendant has no concern. When the policy was issued, it could not be known whether the contractors would perform their contract. If they abandoned it, the owners would derive such advantage as would accrue from the partial construction of the buildings prior to such abandonment. It is possible that, if the defendant is compelled to pay the policy, the plaintiffs may, if they insist upon their rights against the contractors, get double compensation, unless they should be adjudged to hold the fund recovered for the contractors. But, however this may be, the owners had an insurable interest to the whole value of the buildings on their land; and the defendants neither can compel the plaintiffs to put the loss on the contractors, nor can they resort to the terms of the building contract to diminish the liability for an actual loss within the terms of the policy.

The fact that improvements on land may have cost the owner nothing, or that, if destroyed by fire, he may compel another person to replace them without expense to him, or that he may recoup his loss by resort to a contract liability of a third person, in no way affects the liability of an insurer, in the absence of any exemption in the policy. See Clover v. Insurance Co., 101 N. Y. 277, 4 N. E. 724; Kernochan v. Insurance Co., 17 N. Y. 428; Riggs v. Insurance Co., 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716; Trust Co. v. Boardman, 149 Mass. 158, 21 N. E. 239.

The judgment should be affirmed. All concur, except MARTIN and VANN, JJ., not sitting. Judgment affirmed.[31]

[31] BUILDING CONDEMNED BY PUBLIC AUTHORITY.—"I fail to find in the able brief submitted by the learned counsel for the defendant any authority supporting their contention respecting the effect upon the plaintiff's insurable interest in the buildings of the proceedings and decrees of the court respecting the character of the building known as the 'addition,' and adjudging it to be a public nuisance. If the building had been actually removed before the fire, by reason of its having been adjudged a nuisance, or had collapsed or been destroyed, why, then, of course, it follows without argument that there could be no liability under the insurance policy; but, until there was actual physical destruction of the building, the defendant continued to be liable for any damage done by fire, so long as its policy of insurance remained in force. In other words, until the decree of the court was actually in effect by the destruction or removal of the building and the abatement of the nuisance, the structure continued to be the property of the plaintiff, and her repeated promises to abate the nuisance did not deprive her of her interest therein as owner, so long as it remained upon her land and was undisturbed. The principle in equity that the law will consider that done which ought to have been done does not apply in this action at law against this defendant, who

GERMANIA FIRE INS. CO. v. THOMPSON.

(Supreme Court of the United States, 1877. 95 U. S. 547, 24 L. Ed. 487.)

Error to the Circuit Court of the United States for the District of Kentucky.

The facts are stated in the opinion of the court.

Mr. Justice MILLER delivered the opinion of the court.

The defendants in error recovered in the Circuit Court of the United States for the District of Kentucky a joint judgment for $3,317.58 on a policy of insurance issued by the Germania Fire Insurance Company, the Hanover Fire Insurance Company, the Niagara Fire Insurance Company, and the Republic Fire Insurance Company, on whiskey in a distiller's bonded warehouse. The distillery and the warehouse were owned and conducted by George H. Dearen, but the spirits were distilled for and owned by the defendants in error at the time the policy was issued. They were also sureties on Dearen's distillery bond to the United States, and as such were liable for the tax on the whiskey if not paid by Dearen, or made out of the whiskey. It will be thus seen that Thompson & Walston had two distinct interests in the whiskey, namely, the general ownership of it, and their liability for the tax on it which Dearen had assumed to pay, and which, if he did not pay, might fall upon them in either of two ways, to wit, by a seizure and sale of the whiskey for the tax by the government, or by a suit on the bond on which they were sureties. The policy, which was manifestly designed to protect both these interests of the assured from loss or damage by fire, was for that reason peculiar and special in its provisions. By its terms the companies bind themselves to "insure Messrs. Thompson & Co. against loss or damage by fire to the amount of $8,000, for the term of one year, upon whiskey, their own or held by them on a commission, including government tax thereon for which they may be liable, contained in the log bonded warehouse of G. H. Dearen."

After the whiskey was burned, these companies paid their share with others of the loss on the value of the whiskey apart from the tax; but by the receipt which they took it was stated that the claim for liability on account of tax remained undecided. Thompson & Co. were sued on their bond with Dearen for this tax; and they notified the insurance companies of the suit, and asked them to defend it,

was not a party in either of the other proceedings or actions affecting this structure. No matter how many judgments or decrees of the court there may have been adjudging the 'addition' to be a nuisance, or how many promises the owner may have made to remove the structure and abate the nuisance, it nevertheless continued to be her property until it was actually removed, or in some substantial manner physically disturbed, and so long as it stood upon the plaintiff's land, attached to and a part of her main building, she had an insurable interest therein." Irwin v. Westchester Fire Ins. Co., 58 Misc. Rep. 441, 109 N. Y. Supp. 612 (1908).

See comment on this case in 21 Harv. Law Rev. 631.

which was declined. Judgments were obtained in each case on the bonds, and Thompson & Co. replevined the judgments. By this is meant that they gave bail which operated as a stay of execution for the period which the law of Kentucky allowed in such cases. The present action was brought by Thompson & Walston to recover the amount of these judgments.

On the trial, evidence was given tending to show that before the fire Walston had sold to his partner, Thompson, all his interest in the partnership, and that Hite Thompson had become interested with the other Thompson in the business to the extent of one-fifth. And, on the hypothesis that the jury believed this, the counsel for the companies asked the court in several forms to instruct the jury that plaintiffs could not recover. This proposition was based on a provision in the policy that it should be void "if the property be sold, or transferred, or any change take place in title or possession, whether by legal process, or judicial decree, or voluntary transfer or conveyance."

The refusal of the court to do so, and the charge of the court to the effect that this change in regard to the ownership, if true, did not defeat the right to recover the amount of the judgments against plaintiffs for taxes, are the errors on which a reversal is asked.

The argument of counsel on the effect of a mere change in the title by one partner selling to another his interest in the property insured, and the authorities presented on both sides, are very able and full, and the decisions are conflicting. So, also, the effect of the introduction of a new part owner, in a case like the present, where the possession and care of the goods remain unchanged, are well considered; but in the view we take of the case it is not necessary that this court should decide these questions.

We are of opinion that a careful consideration of the facts of this case, in their relation to some of the most elementary principles of the contract of insurance, will enable us to dispose of it without much difficulty.

It is to be observed, that, whether insurance be against fire, or marine loss, or loss of life, it is neither the property nor the life that is insured. Nor does the contract propose or intend to say that there shall be no destruction of the property or loss of life. In point of fact, the obligation of the insurer is designed to come into operation after the loss either of property or life has occurred, and to give compensation to some one interested in the life or the property, for the loss of that life or injury to the property.

In regard to property this compensation is intended by the fundamental principles of insurance to bear a direct relation to the moneyed value of the interest which the party insured had in the property. Where the only interest of the assured is the full and prefect ownership of the property, that is the interest insured; and the amount to be recovered on the policy of insurance is that full value or such sum less than that as the insurer stipulates to be liable for.

But it often occurs that the interest of the party insured is not that of full ownership. His interest may be that of a trustee, or executor, or some other representative character, in which case the recovery will be in accordance with the nature of the contract. The policy before us is a striking illustration of this. The interest of the plaintiffs in the whiskey which is insured in threefold—their own, or held on a commission, and the government tax, for which they may be held liable. If the makers of this policy intended to insure no other interest of Thompson & Co. in the whiskey than their proprietary interest, the interest which at the time of the loss they had as owners of the whiskey, the enumeration of the two other interests was useless and misleading.

The facts already stated show that they had another interest; and since they insured it, it must be presumed that it was known to the insurers. The whiskey which they owned was liable to the government for a tax; and this Dearen was primarily liable for and had promised to pay, but, if he did not, the whiskey could be sold for it. They had also become bound with him on his bond for the payment of this tax. In the event of the whiskey being destroyed by fire, the danger of their personal liability was greatly increased. They were, therefore, right in wishing to be secured against this loss also, if the whiskey was burnt. It is impossible to give any other construction to the policy than that the company agreed to furnish this indemnity. The language, when brought into relation with the conceded facts of the case, admits of no other.

This interest was an insurable interest, as much as freights at sea or profits in an adventure. The whiskey stood between them and their loss. The whiskey when in the warehouse was loaded with this tax. It would sell for as much less as the tax, unless the tax was paid. So long as it was in the warehouse, plaintiffs were not liable for the tax. The moment it was lost they became liable. This was a fair subject of insurance. Fireman's Fire Insurance Co. v. Powell, 13 B. Mon. (Ky.) 311; Gordon v. Massachusetts Fire & Marine Insurance Co., 2 Pick. (Mass.) 249; Rohrbach v. Germania Fire Insurance Co., 62 N. Y. 47, 20 Am. Rep. 451.[32]

In regard to this interest, Walston had never parted with it. His sale of the partnership interest did not release him from his liability on Dearen's bonds; nor did the subsequent purchase of Hite Thompson of one-fifth interest in the whiskey have that effect, or destroy Walston's interest to that extent in the whiskey. As to him, it is very clear that he had the strongest interest that the whiskey should be secure from fire until the tax on it was paid, since its continued existence was his best, if not his only, security against liability on the bonds.

[32] See, also, Hanover Fire Ins. Co. v. Bohn, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719 (1896).

It is to be observed that no other interest of Thompson & Co. is in issue in this suit. They never held the whiskey on commission, and the loss in regard to the proprietary interest had been paid by the companies. This was another and a different interest in the same property. A man might insure his interest in property as an executor, and his interest as a legatee. His removal from the office of executor by the proper court might, within the terms of this policy, prevent his recovering in that character; but if his interest in the property as legatee was one-sixth, would the change of executorship bar his recovery as legatee? This would hardly be asserted by any one.

It is objected further to a recovery that plaintiffs have not actually paid the judgment. The answer to this, if any were necessary, is that by the law of Kentucky the replevin bond is a satisfaction of the judgment. It is as to this obligor a debt discharged. It is said that, in case of a loss like this, the government cannot collect the tax from the bondsmen. The answer is, that the government has sued and obtained judgment for the tax; and defendants were asked to defend that suit, and declined to do so.

Judgment affirmed.

FARMERS' MUT. INS. CO. v. NEW HOLLAND TURNPIKE ROAD CO.

(Supreme Court of Pennsylvania, 1888. 122 Pa. 37, 15 Atl. 563.)

GREEN, J. We cannot understand upon what principle evidence was admitted to prove loss of tools on the turnpike road of the plaintiff. The contract in suit was a policy of fire insurance on a bridge. The bridge having been destroyed by fire, if there was liability on the part of the insurance company, the measure of that liability would be the value of the loss, which would consist of the injury to the bridge. If the bridge was totally destroyed, the loss would be the total amount of the insurance; but, if only partially destroyed, it would be the value of the injury. In no circumstances can there be a legitimate measure of liability on a fire insurance policy which represents the loss of profits of a business which might be carried on at the structure destroyed, if it were standing. Such is not the contract of the parties. Neither is there any liability, as for rent of the premises destroyed, or for any other advantage which may have been derived from its use. If a period of time elapses before the building is restored, or if it is never restored, the liability of the insurer is not for a loss of the use or rental of the building, but for the value of the loss, with interest on the same until payment is made. These fundamental principles, which are inherent in the contract of insurance, were disregarded when the plaintiff was permitted to prove the loss of tolls for non-user of the bridge while it was being rebuilt. For this reason we sustain the fourth assignment of error.

We think it was also error to permit the county of Lancaster to interplead as a claimant. There was no contract of insurance with the county, and after intervening there could be no recovery as for any loss sustained by the county. There was no identity of interest in the bridge as between the turnpike company and the county. If the turnpike company had any interest in it, it was that interest which was represented by the amount of its contribution to the cost of the bridge; but in that contribution the county necessarily could have no interest. The whole of it belonged to the turnpike company, and no part of it, in any contingency, belonged to the county. The principle recognized in Miltenberger v. Beacom, 9 Pa. 198, has no application. We therefore sustain the tenth assignment of error.

The more important question, however, is whether the turnpike company had any insurable interest in the bridge. It is a novel question, but perhaps not difficult of solution. The basis upon which the insurable interest is claimed to exist is the fact that the turnpike company contributed $5,500 to the cost of erecting the bridge, being one-third its total cost, $16,500. If this contribution was compulsory,—that is, legally compulsory,—it would perhaps have to be admitted that an interest in the bridge, legal or equitable, would necessarily flow from it; for it cannot be supposed that the law would oblige any person or corporation to contribute directly to the cost of erecting a structure, without conferring an interest in the structure which the law would recognize and enforce. While saying this, we do not, of course, refer to that kind of contribution which is accomplished by the payment of taxes. Such contribution is, of course, for public use, and confers no title or interest upon the tax-payer in structures which may be erected with public funds. But in this case there is no pretense of any compulsion upon the turnpike company. The evidence as to the payment of the money is barren of information, except as to the mere fact of the payment. There is absolutely no testimony to prove why, or upon what consideration, or for what purpose or reason, the turnpike company paid any part of the cost of erecting the bridge. It is not difficult to imagine a reason, since, as the company's road crossed the stream over which the bridge was erected, it would be quite desirable for them to have a bridge over which persons using the road could travel. But while that might be a reason for the company building a bridge of its own, it was still the fact that the bridge was a public county bridge, free to all travel, built many years before by a private person, who transferred it to the county, and hence the property of the county exclusively.

Being thus a free, public bridge, there could not possibly be any private estate or ownership in it. The turnpike company could charge no tolls for passing over it. They could exercise no acts of ownership over it. They could not obstruct it, nor take it down, even to rebuild it, without the consent of the county, and perhaps not even with such

consent, as it was a part of the public highway. In point of fact, while the turnpike company did contribute the third part of the cost of its erection, after the former bridge had fallen down, the county at that time paid the other two-thirds of the cost, and re-erected the bridge in discharge of its undoubted legal obligation to do so. And so after its destruction by fire, in 1882, it was again rebuilt by the county as a public county bridge, in obedience to a general law of this commonwealth, (Act May 5, 1876, P. L. 112,) and the decree of this court, (Myers v. Com., 110 Pa. 217, 1 Atl. 264.) All this was done without any cost to this plaintiff, who now enjoys the use of the bridge in the same manner and to the same extent as before the fire. The only injury the plaintiff has sustained by the fire is in being deprived of the use of the bridge, not as its own, but as a part of the public highway, during the period of the reconstruction of the bridge. But for that injury the defendant was not responsible in any sense, and it never assumed an obligation to make compensation for it. The county was legally charged with the duty of rebuilding, and, however an argument might be made against the county for not performing its duty in that regard with promptness, it is perfectly manifest that the breach of that duty by the county conferred no right of action against the defendant insurance company.

What, then, remains to impose any liability upon the defendant? The bridge is restored without any expense to the plaintiff. Every right which the plaintiff enjoyed before the fire is enjoyed since, so far as the bridge is concerned, without any additional cost to the plaintiff. It may be remarked, in passing, that the right of the plaintiff in the bridge is only the public and common right of its patrons, as citizens, to use the bridge as a part of the public highway. It is therefore not a right peculiar to the plaintiff in any sense. It may well be questioned, even if the plaintiff had an insurable interest in the bridge, whether any injury has been sustained to that interest, sufficient to impose any liability upon the defendant as an insurer. Suppose a recovery is permitted, and the plaintiff recovers the amount of the insurance money. As they are not obliged to expend the money in reconstruction, and yet reconstruction has been accomplished without cost to them, they simply get back and keep the money they voluntarily contributed in 1868, to the construction of the bridge. But if the bridge had not burned down, that money could not have been recovered. How, then, were they injured by the fire? They have the bridge as they had it before, without cost to them; and the diminution of their tolls, during the period of reconstruction, cannot be compensated in an action on the policy. For this reason, therefore, if for no other, we cannot discover any cause of action against this defendant.

But independently of this consideration, all the definitions of an "insurable interest" import an interest in the property insured which can be enforced at law or in equity. Thus we said in Miltenberger v.

Beacom, 9 Pa. 199: "It is accordingly recognized as a rule, in this department of the law, that almost any qualified property in the thing insured, or any reasonable expectation of profit or advantage to spring from it, may be the subject of this species of contract, provided it be founded in some legal or equitable title." In 1 Wood, Ins. 625, 626, it is said: "A right, too, must be of such a nature, in order to constitute an interest, as the law will recognize and enforce; for a mere moral title will not sustain an insurance." Fland. Ins. 388: "A mere general interest, not susceptible of enforcement, which does not specifically apply either in terms or by the operation of law, is not insurable." 1 Wood, Ins. 656: "The interest must be enforceable either at law or in equity." Wilson v. Insurance Co., 19 Pa. 374: "Interest in the property insured is an essential link in the relation of insurance." Sweeny v. Insurance Co., 20 Pa. 342: "The rule is valuable and well founded that he who has no interest can have no insurance. That he must show his interest, and that it is the extreme measure of his recovery, are the corollaries of the rule." Insurance Co. v. Murray, 73 Pa. 28: "Hence the court was correct in charging that the insurable interest of the lessees was to the extent of the value of the property which they were bound to replace." See, also, Grevemeyer v. Insurance Co., 62 Pa. 340, 1 Am. Rep. 420.

It is unnecessary to multiply citations. There was clearly no interest in the bridge, belonging to the turnpike company, which could be recognized or enforced, either at law or in equity. There could not be any right of property of any kind, nor of possession nor of custody. Even the use of it was not a use by the plaintiff in its corporate capacity, but a mere right of passage over it, which belonged to all citizens in common. The money which was contributed to its construction by the plaintiff was a mere gratuity, which it was not bound to give, and which it could never recover. In such circumstances, there was no interest or property in the bridge as a structure, and hence no insurable interest capable of protection and enforcement.

We sustain the first, second, and third assignments. Judgment reversed.

BASSETT v. FARMERS' & MERCHANTS' INS. CO.

(Supreme Court of Nebraska, 1909. 85 Neb. 85, 122 N. W. 703, 19 Ann. Cas. 252.)

Action by John W. Bassett against the Farmers' & Merchants' Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

ROOT, J. In 1902 John W. Bassett, plaintiff herein, purchased a farm in Otoe county, and procured the conveyance therefor to be made to his wife. In 1904 defendant insured plaintiff for five years

against loss by fire of the dwelling house on said farm. In 1906 the house was totally destroyed by fire. Defendant denied liability upon its policy, and returned the premium received by it from plaintiff, which he retained some months, and then sent back to defendant. Defendant tenders plaintiff the amount of said premium.

1. The most important question raised by the defense is that under the facts plaintiff did not have an insurable interest in the property destroyed, and for that reason cannot recover. Without an insurable interest, plaintiff ought not to prevail. Stanisics v. Hartford Fire Ins. Co., 83 Neb. 768, 120 N. W. 435. At the time the policy was issued excepting only her homestead, a married woman in Nebraska could dispose of her real estate without her husband's assent, and by her sole deed convey title thereto freed from his interest inchoate or otherwise therein. The farm under consideration was not a homestead. Not only may the wife thus convey her real estate, but during her lifetime the husband has no right to its possession or control nor to any part of the rents and profits issuing therefrom. Cases may be cited to sustain the proposition that the husband's estate by the curtesy initiate is an insurable interest; but an examination of those cases will disclose that they are based upon laws giving the husband more than a mere expectancy in the wife's land. In jurisdictions where the lawmaking power has completely emancipated a married woman's property from the control of her husband, the possibility that he will receive a benefit from the real estate of which she may die seised is not considered an insurable interest during her lifetime. Clark v. Insurance Co., 81 Me. 373, 17 Atl. 303; Traders' Insurance Co. v. Newman, 120 Ind. 554, 22 N. E. 428; Planters' Ins. Co. v. Loyd, 71 Ark. 292, 73 S. W. 725.

Plaintiff argues that, if the holder of the property insured will suffer a loss by its destruction, he has an insurable interest therein. An examination of the cases cited upon that point will disclose that the assured in each instance had some substantial interest in the subject insured, an interest that would be recognized and protected by the courts. If plaintiff were enjoying the possession of a house rent free without any contract with the owner and under such circumstances that the latter might dispossess the former any time, it would hardly be contended that he had an insurable interest in the dwelling. So far as the proof goes, plaintiff holds possession of the farm by sufferance of his wife, and not by force of any lawful or equitable right.

Counsel argue that Mrs. Bassett has only a dry, naked, legal title to the farm, and that the beneficial one is in plaintiff, but the difficulty is that the proof does not sustain that assumption. Mrs. Bassett did not testify, nor has plaintiff stated, that there was any arrangement between himself and wife, oral or otherwise, by which he was to have a life estate in the farm. Nor is there any proof that the deed to Mrs. Bassett does not convey the title in just such form as plaintiff desired.

In Redfield v. Holland Purchase Ins. Co., 56 N. Y. 354, 15 Am. Rep.

424, cited as in point, the wife had agreed orally that her husband should have the use during his natural life of the property conveyed to her at his instance. He was in possession of the land, and the court held that there had been complete performance by the husband of the oral agreement so as to take it out of the statute of frauds, and that he had an equitable title to the real estate. But in the case at bar the proof merely discloses that plaintiff purchased the land and directed the vendor to convey direct to his wife, and, in conformity with his instructions, she received a warranty deed therefor. He testified that he desired her to have the land without administration if she survived him, and, should she predecease him, he would inherit from her.

It may be that the facts will justify a court finding that there was an arrangement between the husband and wife entered into before the deed was made to her that he could have the use of the land during his lifetime, but there is no evidence in the record of those facts. Upon the proof plaintiff is in the same situation as though he had taken possession of his wife's separate property and leased it for his own benefit. The wife could oust him any time she saw fit. In the state of the record there is a failure of proof upon a vital fact in issue. Pope v. Glenns Falls Ins. Co., 136 Ala. 670, 34 South. 29. * * *[33]

There is not a scintilla of evidence to indicate that the fire was of incendiary origin, and we dislike very much to reverse the judgment before us, but the failure of proof referred to is clear and our duty imperative. The judgment of the district court is reversed, and the cause remanded for further proceedings.[34]

REESE, C. J., absent and not sitting.

LOYD v. PLANTERS' MUT. INS. CO.

(Supreme Court of Arkansas, 1906. 80 Ark. 486, 97 S. W. 658.)

Action by T. M. Loyd against the Planters' Mutual Insurance Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

HILL, C. J. This is the third appearance of this case here. See Planters' Mutual Ins. Co. v. Loyd, 67 Ark. 584, 56 S. W. 44, 77 Am. St. Rep. 136, and Planters' Mutual Ins. Co. v. Loyd, 71 Ark. 292, 75 S. W. 725. On the third trial the court directed a verdict for the insurance company, and Loyd appealed.

[33] Part of the opinion, not relating to insurable interest, is omitted.

[34] The cases dealing with the husband's insurable interest in his wife's property, real and personal, are collected in the note appended to the report of Tyree v. Va. F. & M. Ins. Co., 55 W. Va. 63, 46 S. E. 706, 104 Am. St. Rep. 983, 2 Ann. Cas. 30 (1904), in 66 L. R. A. 657–662, and in note in 45 L. R. A. (N. S.) 1131, where is reported Kludt v. German Mut. Fire Ins. Co., 152 Wis. 637, 140 N. W. 321, 45 L. R. A. (N. S.) 1131 (1913), strongly opposed to the conclusion reached in the principal case.

It is contended that facts were brought out on the last trial, not heretofore in the record, which entitled appellant to go to the jury on the new issues. The matters relied upon are these: (1) That Loyd had an insurable interest in the property by virtue of being surety on a bond for the purchase price of the property; and (2) that he had an insurable interest by reason of an estate by the curtesy initiate in the property.

1. The facts regarding the suretyship brought out on the last trial were these: Kiser obtained judgment against Loyd for $74 for material going into the construction of the house covered by the insurance policy in suit, and the property was sold under it on 22d December, 1896. Loyd bought it in his wife's name, and he and Kinsworthy went on the bond for purchase money. On January 25, 1897, this insurance policy was written for a term of three years, $750 on the house and $250 on the personalty, and on March 2, 1897, it was destroyed by fire. Kinsworthy paid the bond, whether before or after the fire is not disclosed.

The contention is that the suretyship on this bond gave Loyd an insurable interest in the property for whose purchase it was given, in that he could be subrogated to the lien of the payee when he discharged it, and, the policy being entire and a valued one, the insurance had something to rest upon and was not a "wager contract." Cases are cited to sustain this contention, where creditors, sureties, and guarantors were, under the facts of those cases, held to have an insurable interest in the property for which their obligation was incurred. These cases have been critically examined, but none has been found among them, nor in an independent research into the subject, which sustains such a remote and uncertain interest in the property as the one in question to be an insurable interest which will support a policy asserting ownership in the assured.

Here there is a bare suretyship for a debt not due when the policy was written, and the debt is only one-tenth the insured value of the house; and there is no showing of any necessity to resort to this property for indemnity in case of default by the principal. Neither when the policy was written nor when the fire occurred had Loyd expended one cent by reason of his suretyship, nor at any time since, as the bond was paid by Kinsworthy, the other surety. Loyd never had any lien upon the property, in law or equity, nor any control or custody of it as security for his liability. Instances where sureties, guarantors, and indorsers have an insurable interest in the subject-matter for which their suretyship, guaranty, or indorsement was given may be found in 1 May on Ins. §§ 80–83, and notes. The facts herein do not bring Loyd within any of the principles which give sureties an insurable interest in the subject-matter for which the suretyship was insured.

2. Proof was made that a child was born alive of the marriage of Dr. and Mrs. Loyd, and it is argued that this created in him an es-

tate by the curtesy initiate in his wife's realty. At common law, and in this state until the adoption of the Constitution of 1874, this would have created such estate in the husband, and such estate is an insurable interest. 1 May on Ins. § 81, and authorities cited. It was held in Neely v. Lancaster, 47 Ark. 175, 1 S. W. 66, 58 Am. Rep. 752, and reiterated in Hampton v. Cook, 64 Ark. 353, 42 S. W. 535, 62 Am. St. Rep. 194, that the Constitution has abolished this estate, and only left the possibility of the estate by the curtesy consummate.

Other questions were pressed in oral argument, but they are not open to the court now, having been settled in former appeals.

Judgment affirmed.[35]

SUN INS. OFFICE OF LONDON v. MERZ.

(Court of Errors and Appeals of New Jersey, 1900. 64 N. J. Law, 301, 45 Atl. 785, 52 L. R. A. 330.)

Error to supreme court.

Action by the Sun Insurance Office of London against Henry Merz. Judgment for defendant, and plaintiff brings error. Reversed.

GUMMERE, J. This is an action brought by the plaintiff in error against Merz to recover upon a policy of insurance by the terms of which Merz and 24 other persons and firms, who had formed an organization known as a "Fire Lloyd's," under the act of March 25, 1895 (2 Gen. St. p. 1784), agreed, for a consideration of $3,000, to reinsure the plaintiff in error for the term of time from the 30th day of September, 1897, at midnight, to the 31st day of December, 1897, at midnight, against all direct loss or damage by fire, to an amount not exceeding in the aggregate the sum of $25,000, nor exceeding the interest of the assured in said property, "to the following described property, to wit, reinsurance of the Sun Insurance Office of London, being a reinsurance of the liability of the Sun Insurance Office for claims for loss and damage by fire or lightning occurring in the months of October, November, and December, 1897, destroying and damaging property located anywhere in the United States and territories. Said property must be damaged or destroyed by fire between midnight of September 30, 1897, and midnight of December 31, 1897."

The questions considered and determined by the supreme court, and now presented here for review, are: First, whether what is known as the "Fire Lloyd's statute of March 25, 1895," as amended by the act of March 26, 1896 (P. L. 1896, p. 156), prohibits the making of a

[35] The cases involving the question whether a surety on an obligation has an insurable interest in property primarily charged with such obligation are collected in the note attached to Mahoney v. State Ins. Co., 133 Iowa, 570, 110 N. W. 1041 (1907), in 9 L. R. A. (N. S.) 490.

contract of reinsurance; and, second, whether the contract now before us is void as being a wagering policy. * * *

We concur in the construction put by the supreme court upon this legislation, and in the conclusion that it does not prohibit the making of contracts by insurers indemnifying them against loss upon policies which they have issued. [See same case, 63 N. J. Law, 365, 43 Atl. 693.]

The supreme court further concluded that the contract sued on was wholly void, because it stipulated for indemnity against losses upon property in some portion of which the plaintiff then had no insurable interest. The ground upon which this conclusion is rested is that, where an insurable interest does not exist at the time of making the contract of indemnity, such contract is a wagering one, and therefore void as against public policy. This was formerly considered to be the rule with relation to fire policies, and was so declared both by text writers and in decided cases, although a contrary view was always taken in construing life and marine insurance policies. Why any such variance in construction existed it is difficult to understand, for, certainly, if a contract to insure after-acquired property against fire is a wagering contract, and therefore void, because against public policy, a contract to insure such property against marine risks, or a contract to insure the life of a person in favor of one who, at the time of the taking out of the policy, has no interest therein, are equally wagering contracts, and, if such contracts are prohibited by public policy, should equally be considered void.

But, although the earlier cases on fire insurance laid down the rule enunciated by the supreme court, experience has taught that the necessities of business and the adequate protection of property require the same methods of insurance against loss by fire as have always existed with relation to losses by the perils of the seas; and reflection has led to the conclusion that contracts of insurance upon property in which the insured has no interest at the time of the issuing of the policy are not wagers if he acquires an interest during the life of the policy, and retains it at the time when the loss occurs. As a result of the application of this later, and, as it seems to us, better-judged doctrine, it has been held that a policy issued to a merchant, drawn, by the intention of the parties to it, to cover goods which should be acquired by the insured from time to time during the continuance of the policy, is a valid contract (Lane v. Insurance Co., 3 Fairf. [12 Me.] 44, 28 Am. Dec. 150); that a policy issued to a farmer, covering not only the live stock then owned by him, but that to be subsequently acquired during the term of the policy, or one issued to him upon crops not yet planted, but which the parties expected would be grown before the expiration of the policy, is legally unobjectionable (Mills v. Insurance Co., 37 Iowa, 400; Sawyer v. Insurance Co., 37 Wis. 503); that insurance upon the constantly changing contents of an oil tank is not prohibited by any rule of public policy, and entitles

the insured to recover the value of the oil which happens to be in the tank at the time when the fire occurred which destroys it (Western & A. Pipe Lines v. Home Ins. Co., 145 Pa. 346, 22 Atl. 665, 27 Am. St. Rep. 703). Other cases in which the same view is taken of the effect to be given to policies of fire insurance, which, by the agreement of the parties, are drawn to cover property which, it is anticipated, the insured will acquire before the time limited therein has expired, are Wood v. Insurance Co., 31 Vt. 552; Hooper v. Insurance Co., 17 N. Y. 424; Hoffman v. Insurance Co., 32 N. Y. 405, 88 Am. Dec. 337; Wolfe v. Insurance Co., 39 N. Y. 49; Lee v. Insurance Co., 11 Cush. (Mass.) 324.

Up to the present time the question has not received consideration at the hands of this court. An examination of the reasons upon which the earlier rule rests has led us to the conclusion that they are not well founded, and that a contract by which the parties provide for indemnity against loss by fire upon property to be subsequently acquired by the party indemnified is not in any sense a gaming contract, and void on that account; in other words, that an insurable interest, subsisting during the risk and at the time of the loss, is sufficient to support a policy insuring against loss by fire. The judgment of the supreme court should be reversed.[36]

SECTION 4.—WHAT CONSTITUTES INSURABLE INTEREST—LIFE INSURANCE

DWYER v. EDIE.

(Court of King's Bench, 1788. Park, Ins. [6th Ed.] 574.)

An action was brought on a policy on the life of James Russell from the 1st of June, 1784, to the 1st of June, 1785. Russell was warranted in good health, and by a memorandum at the foot of the policy it was declared that it was intended to cover the sum of £5000. due from Russell to the plaintiff, for which he had given his note payable in one year from the 14th of May, 1784. Two objections were made on the part of the defendant: 1st, That part

[36] "It is now, however, clearly established that an insurable interest, subsisting during the risk and at the time of loss, is sufficient, and that the assured need not also allege or prove that he was interested at the time of effecting the policy." 1 Arnould, Mar. Ins. (2d Perkins' Ed.) 232, citing Rhind v. Wilkinson, 2 Taunt. 237 (1810); Lane v. Maine Mut. Fire Ins. Co., 12 Me. 44, 28 Am. Dec. 150 (1835).

"Sec. 2552. When interest must exist. An interest insured must exist when the insurance takes effect, and when the loss occurs, but need not exist in the meantime." Civil Code of California.

See Bibend v. Insurance Co., 30 Cal. 78, 89 (1866), and Howard v. Insurance Co., 11 Can. Sup. Ct. 92 (1885), contra to principal case.

of the consideration for the note was money won at play: 2dly, That Russell at the time he gave the note was an infant.

Mr. Justice BULLER nonsuited the plaintiff upon the ground of part of the consideration of the note being for a gaming transaction; and therefore there was a want of interest in the plaintiff. But as to the other objection on account of infancy, the interest must be contingent, for Russell might or might not avoid his note; and he doubted much whether, till so avoided, the note must not be taken against a third person to be the note of an adult, for the maker of the note only could take the objection.[37]

DALBY v. INDIA & LONDON LIFE-ASSUR. CO.

(Exchequer Chamber, 1854. 15 C. B. 365, 24 L. J. C. P. 2-9, 18 Jur. 1024.)

PARKE, B.[38] If we should, upon consideration, think that the interest must be a continuing interest, as my Brother Channell contends, we will hear the matter further discussed upon the question whether the facts disclosed upon this bill of exceptions shew such continuing interest.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the court:

This case comes before us on a bill of exceptions to the ruling of my Brother Cresswell at nisi prius. We learn, that, on the trial, he reserved the important point which arose in it for the consideration of the court of common pleas; and that, where it came on for discussion, it was thought right to put it on the record in the shape of a bill of exceptions, that it may be carried, if it should be thought proper, to the highest tribunal; and we have now, after a very able argument on both sides, to dispose of it in this court of error.

It is an action on what is usually termed a policy of life-assurance, brought by the plaintiff as a trustee for the Anchor Assurance Company, on a policy for £1000 on the life of his late royal highness, the Duke of Cambridge.

The Anchor Life-Assurance Company had insured the duke's life in four separate policies,—two for £1000, and two for £500 each, granted by that company to one Wright. In consequence of a resolution of their directors, they determined to limit their insurances to £2000 on one life; and, this insurance exceeding it,

[37] In Anderson v. Edie, Park, Ins. (6th Ed.) 575 (1795), Lord Kenyon was of opinion: "That this debt was a sufficient interest; and said that it was singular, that this question had never been directly decided before. That a creditor had certainly an interest in the life of his debtor, the means by which he was to be satisfied may materially depend upon it, and at all events the death must in all cases in some degree lessen the security."

[38] The very full statement of facts and extensively reported arguments of counsel are omitted.

they effected a policy with the defendants for £1000 by way of counter-insurance.

At the time this policy was subscribed by the defendants, the Anchor Company had unquestionably an insurable interest to the full amount. Afterwards, an arrangement was made between the office and Wright, for the former to grant an annuity to Wright and his wife, in consideration of a sum of money, and of the delivery up of the four policies to be cancelled, which was done; but one of the directors kept the present policy on foot, by the payment of the premiums till the duke's death.

It may be conceded, for the purpose of the present argument, that these transactions between Wright and the office totally put an end to that interest which the Anchor Company had when the policy was effected, and in respect of which it was effected: and that, at the time of the duke's death, and up to the commencement of the suit, the plaintiff had no interest whatever.

This raises the very important question, whether, under these circumstances, the assurance was void, and nothing could be recovered thereon.

If the court had thought some interest at the time of the duke's death was necessary to make the policy valid, the facts attending the keeping up of the policy would have undergone further discussion.

There is the usual averment in the declaration, that, at the time of the making of the policy, and thence until the death of the duke, the Anchor Assurance Company was interested in the life of the duke, and a plea, that they were not interested modo et formâ,—which traverse makes it unnecessary to prove more than the interest at the time of making the policy, if that interest was sufficient to make it valid in point of law. Lush v. Russell, 5 Exch. 203. We are all of opinion that it was sufficient; and, but for the case of Godsall v. Boldero, 9 East, 72, should have felt no doubt upon the question.

The contract commonly called life-assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life,—the amount of the annuity being calculated, in the first instance, according to the probable duration of the life: and, when once fixed, it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same, on the other. This species of insurance in no way resembles a contract of indemnity.

Policies of assurance against fire and against marine risks, are both properly contracts of indemnity,—the insurer engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings, ships, and effects. Policies on maritime risks were afterwards used improperly, and made mere wagers on the happen-

ing of those perils. This practice was limited by the 19 Geo. II. c. 37, and put an end to in all except a few cases. But, at common law, before this statute with respect to maritime risks, and the 14 Geo. III. c. 48, as to insurance on lives, it is perfectly clear that all contracts for wager-policies, and wagers which were not contrary to the policy of the law, were legal contracts; and so it is stated by the court, in Cousins v. Nantes, 3 Taunt. 315, to have been solemnly determined in the case of Lucena v. Crawford, 2 Bos. & P. 324, 2 N. R. 269, without even a difference of opinion among all the judges. To the like effect was the decision of the court of error in Ireland, before all the judges except three, in Insurance Co. v. Magee, Cooke & A. 182, that the insurance was legal at common law.

The contract, therefore, in this case, to pay a fixed sum of £1000 on the death of the late Duke of Cambridge, would have been unquestionably legal at common law, if the plaintiff had had an interest therein or not: and the sole question is, whether this policy was rendered illegal and void by the provisions of the statute 14 Geo. III. c. 48. This depends upon its true construction.

The statute recites, that the making insurances on lives and other events wherein the assured shall have no interest, hath introduced a mischievous kind of gaming: and, for the remedy thereof, it enacts "that no insurance shall be made by any one on the life or lives of any person or persons, or on any other events whatsoever, wherein the person or persons for whose use and benefit, or on whose account, such policy shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever."

As the Anchor Assurance Company had unquestionably an interest in the continuance of the life of the Duke of Cambridge,—and that to the amount of £1000, because they had bound themselves to pay a sum of £1000 to Mr. Wright on that event,—the policy effected by them with the defendants was certainly legal and valid, and the plaintiff, without the slighest doubt, could have recovered the full amount, if there were no other provisions in the act.

This contract is good at common law, and certainly not avoided by the 1st section of the 14 Geo. III. c. 48. This section, it is to be observed, does not provide for any particular amount of interest. According to it, if there was any interest, however small, the policy would not be avoided.

The question arises on the third clause. It is as follows: "And be it further enacted, that, in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers, than the amount or value of the interest of the assured in such life or lives, or other event or events."

Now, what is the meaning of this provision?

On the part of the plaintiff, it is said, it means only, that, in all cases in which the party insuring has an interest when he effects the policy, his right to recover and receive is to be limited to that amount; otherwise, under colour of a small interest, a wagering policy might be made to a large amount,—as it might if the first clause stood alone. The right to recover, therefore, is limited to the amount of the interest at the time of effecting the policy. Upon that value, the assured must have the amount of premium calculated: if he states it truly, no difficulty can occur: he pays in the annuity for life the fair value of the sum payable at death. If he misrepresents, by overrating the value of the interest, it is his own fault, in paying more in the way of annuity than he ought; and he can recover only the true value of the interest in respect of which he effected the policy: but that value he can recover. Thus, the liability of the assurer becomes constant and uniform, to pay an unvarying sum on the death of the cestui que vie, in consideration of an unvarying and uniform premium paid by the assured. The bargain is fixed as to the amount on both sides.

This construction is effected by reading the word "hath" as referring to the time of effecting the policy. By the 1st section, the assured is prohibited from effecting an insurance on a life or on an event wherein he "shall have" no interest,—that is, at the time of assuring: and then the 3rd section requires that he shall cover only the interest that he "hath." If he has an interest when the policy is made, he is not wagering or gaming, and the prohibition of the statute does not apply to his case. Had the 3rd section provided that no more than the amount or value of the interest should be insured, a question might have been raised, whether, if the insurance had been for a larger amount, the whole would not have been void: but the prohibition to recover or receive more than that amount, obviates any difficulty on that head.

On the other hand, the defendants contend that the meaning of this clause is, that the assured shall recover no more than the value of the interest which he has at the time of the recovery, or receive more than its value at the time of the receipt.

The words must be altered materially, to limit the sum to be recovered to the value at the time of the death, or (if payable at a time after death) when the cause of action accrues.

But there is the most serious objection to any of these constructions. It is, that the written contract, which, for the reasons given before, is not a wagering contract, but a valid one, permitted by the statute, and very clear in its language, is by this mode of construction completely altered in its terms and effect. It is no longer a contract to pay a certain sum as the value of a then-existing interest, in the event of death, in consideration of a fixed annuity calculated with reference to that sum: but a contract to pay,—contrary to its express words,—a varying sum, according to the alteration of the value

of that interest at the time of the death, or the accrual of the cause of action, or the time of the verdict, or execution: and yet the price, or the premium to be paid, is fixed, calculated on the original fixed value, and is unvarying: so that the assured is obliged to pay a certain premium every year, calculated on the value of his interest at the time of the policy, in order to have a right to recover an uncertain sum, viz. that which happens to be the value of the interest at the time of the death, or afterwards, or at the time of the verdict. He has not, therefore, a sum certain, which he stipulated for and bought with a certain annuity; but it may be a much less sum, or even none at all.

This seems to us so contrary to justice and fair dealing and common honesty, that this construction cannot, we think, be put upon this section. We should, therefore, have no hesitation, if the question were res integra, in putting the much more reasonable construction on the statute, that, if there is an interest at the time of the policy, it is not a wagering policy, and that the true value of that interest may be recovered, in exact conformity with the words of the contract itself.

The only effect of the statute, is, to make the assured value his interest at its true amount when he makes the contract.

But it is said that the case of Godsall v. Boldero, 9 East, 72, has concluded this question.

Upon considering this case, it is certain that Lord Ellenborough decided it upon the assumption that a life-policy was in its nature a contract of indemnity, as policies on marine risks, and against fire, undoubtedly are; and that the action was, in point of law, founded on the supposed damnification, occasioned by the death of the debtor, existing at the time of the action brought: and his lordship relied upon the decision of Lord Mansfield in Hamilton v. Mendes, 2 Burrows, 1270, that the plaintiff's demand was for an indemnity only. Lord Mansfield was speaking of a policy against marine risks, which is in its terms a contract of indemnity only. But that is not of the nature of what is termed an assurance for life: it really is what it is on the face of it,—a contract to pay a certain sum in the event of death. It is valid at common law; and, if it is made by a person having an interest in the duration of the life, it is not prohibited by the statute 14 Geo. III. c. 48.

But, though we are quite satisfied that the case of Godsall v. Boldero was founded on a mistaken analogy, and wrong, we should hesitate to overrule it, though sitting in a court of error, if it had been constantly approved and followed, and not questioned, though many opportunities had been offered to question it. It was stated that it had not been disputed in practice, and had been cited by several eminent judges as established law. The judgment itself was not, and could not be, questioned in a court of error: for, one of the issues, nil debet, was found for the defendant.

Since that case, we know practically, and that circumstance is mentioned by some of the judges, in the cases hereinafter referred to, that the insurance-offices, generally speaking, have not availed themselves of the decision, as they found it very injurious to their interest to do so. They have, therefore, generally speaking, paid the amount of their life-insurances, so that the number of cases in which it could be questioned is probably very small indeed. And it may truly be said, that instead of the decision in Godsall v. Boldero being uniformly acquiesced in, and acted upon, it has been uniformly disregarded.

Then, as to the cases. There is no case at law, except that of Barber v. Morris, 1 Man. & R. 62, in which the case of Godsall v. Boldero was accidentally noticed as proving it to be necessary that the interest should continue till the death of the cestui que vie. It was proved in that case to be the practice of the particular office in which that assurance was made, to pay the sums assured, without inquiry as to the existence of an insurable interest: and on that account it was held that the policy, though in that case the interest had ceased, was a valuable policy, and the plaintiff could not recover, on the ground that the defendant, the vendor of it, was guilty of fraudulent concealment, in not disclosing that the interest had ceased. This was the point of the case: and, though there was a dictum of Lord Tenterden, that the payment of the sum insured could not be enforced, it was not at all necessary to the decision of the case.

The other cases cited on the argument in this case, were cases in equity, where the propriety of the decision of Godsall v. Boldero did not come in question.

The questions arose as to the right of the creditor and debtor, inter se, where the offices have paid the value of a policy, in Humphrey v. Arabin, 2 Lloyd & G. 318; Henson v. Blackwell, 4 Hare, 434, cor. Sir J. Wigram, V. C.; Phillips v. Eastwood, 1 Lloyd & G. t. Sugd. 281,—where the point decided was, that a life-policy, as a security for a debt, passed under a will bequeathing debts: the lord chancellor stating that the offices found it not for their benefit to act on the rigid rule of Godsall v. Boldero. In these cases, the different judges concerned in them do not dispute,—some, indeed, appear to approve of,—the case of Godsall v. Boldero: but it was not material in any to controvert it; and the questions to be decided were quite independent of the authority of that case.

We do not think we ought to feel ourselves bound, sitting in a court of error, by the authority of this case, which itself could not be questioned by writ of error; and as so few, if any, subsequent cases have arisen in which the soundness of the principle there relied upon could be made the subject of judicial inquiry; and as, in practice, it may be said that it has been constantly disregarded.

Judgment reversed, and venire de novo.

HEBDON v. WEST.

(Court of Queen's Bench, 1863. 3 Best & S. 579.)

This was an action against the defendant, one of the directors of the International Life Assurance Society.

The declaration set out a policy, dated the 7th May, 1857, by which the plaintiff effected an assurance with the Society, in the sum of £2500, upon the life of Edward Pedder, of Preston, Lancashire, banker.

The defendant's first plea denied the plaintiff's interest in the life of Pedder. His second plea, in bar of the plaintiff's action, alleged the receipt of £5000, from another insurer on account of a policy on Pedder's life, and that that sum was equal to plaintiff's interest in Pedder's life. The third plea, to the indebitatus counts, was never indebted. The plaintiff demurred to the second plea, and took issues on the first and third.

On the trial, before Crompton, J., at the Winter Assizes holden at Liverpool, in 1861, it appeared that the plaintiff had been for twenty years clerk in a bank at Preston, of which Edward Pedder was the senior and managing partner. In 1855 there was an intention to make the plaintiff a partner; but that was not carried out, and instead thereof his salary was increased from £200. a year to £600., and it was to continue at that amount for seven years; he was also employed by Pedder as his agent in collecting rents, for which he received a commission of £16. a year; but there was no contract to continue him in that employment. Before this period the plaintiff had been engaged in unsuccessful speculations, and had been assisted by advances from the bank to the amount of about £4700. In the course of conversations between the plaintiff and Pedder upon the subject of this debt, Pedder had told the plaintiff that, during his (Pedder's) life, he should never be called upon for the money; and the plaintiff, being desirous to secure himself in the event of Pedder's death, requested and obtained his permission to insure his life to provide against his debt. Accordingly, the plaintiff effected an insurance with the City of Glasgow Life Insurance Company, dated the 4th April, 1856, on the life of Pedder, for £5000. At the end of twelve months from this time, the plaintiff's debt to the bank having increased to £6000., he obtained the consent of Pedder to his effecting another insurance upon his life; and on the 7th May, 1857, he effected the policy upon which this action was brought. Pedder died on the 21st March, 1861; and the bank stopped payment in the same year. The plaintiff paid the sum of £5000. which he received from the City of Glasgow Life Insurance Company, to the inspectors appointed for winding up the affairs of the bank.

A verdict was entered for the plaintiff for £2500. and interest, leave being reserved to move to enter a nonsuit, or a verdict for the defendant on the first and second pleas, or to reduce the damages.[39]

WIGHTMAN, J., delivered the judgment of the Court.

There are two questions in this case. The first, is, whether Hebdon had any insurable interest at all in the life of Pedder; and the second, whether, assuming that he had an insurable interest, the payment of the £5000. by the Glasgow Life Insurance Company, as stated in the second plea, is an answer to the plaintiff's claim.

With respect to the insurable interest of the plaintiff, it was determined, in the case of Halford v. Kymer, 10 B. & C. 724 (E. C. L. R. vol. 21), that, unless the insured have a pecuniary interest in the life insured, the policy is void by the 14 G. 3, c. 48, s. 1. In the present case it was contended for the plaintiff that he had two kinds of insurable interest in the life of Pedder,—one, on the ground of a promise that Pedder had made to him that he (Pedder) would not enforce the payment of any debt that the plaintiff might owe him during his (Pedder's) lifetime, and the other, on the ground that the plaintiff was in the employ of Pedder at a salary of £600. a year, under an agreement that the engagement should last for seven years. We do not think that the first kind of interest in the life of Pedder, namely, that he had said that he would not enforce payment of debts due to him from the plaintiff during his (Pedder's) life, without any consideration or any circumstance to make such a promise in any way binding, can be considered as a pecuniary or indeed an appreciable interest in the life of Pedder. The other kind of interest, namely, that which arises from the engagement by Pedder to employ the plaintiff for seven years at a salary of £600. a year, may, we think, be considered as a pecuniary interest in the life of Pedder, to the extent at least of as much of the period of seven years as would remain at the time the policy was effected, which appears to have been about five years. This, at the rate of £600. per annum, would give the plaintiff a pecuniary interest in the life of Pedder to the amount of £3000., which would be sufficient to sustain the present policy, which is for £2500. only.

We assume, then, that the plaintiff had a pecuniary interest in the life of Pedder to the extent of £2500. at the time he effected the policy with the defendant's office. If that be so, the question then arises whether payment, after the death of Pedder, of £5000. by another life insurance company, with whom the plaintiff had also insured Pedder's life to that amount, is a bar to the plaintiff's claim by virtue of the 3d section of the 14 G. 3, c. 48, it being taken as a fact that the £5000. included all the insurable interest that the plaintiff had at the time of making both policies; in fact that the interest

[39] The statement of facts is abbreviated and the arguments of counsel are omitted.

of the plaintiff at the time of making the insurance with the defendant was the same as that which he had when he made the insurance with the other company.

It was contended for the defendant that, admitting that the plaintiff had an insurable interest in the life of Pedder to the extent of £5000. at the times when both the policies were effected, the payment of the £5000. by the Glasgow Company was a bar to the recovery by the plaintiff upon the policy effected with the defendant, by the terms of the 3d section of the before-mentioned statute, which provides that "no greater sum shall be recovered or received from the insurer or insurers than the amount of value of the interest of the insured" in the life which is the subject of the insurance; and that, as all the pecuniary interest of the plaintiff in the life of Pedder was recovered from the Glasgow Company, he was not entitled to recover from another set of insurers the amount of interest which was included in the insurance with them. It was said that, if this were otherwise, the object of the statute would be defeated, as a small amount of insurable interest might be made the foundation for a great number of insurances, each to the amount of the whole of the interest of the insured; and, if he could recover upon each of these, it would be against the words of the 3d section of the statute, which are, that the insured shall only recover from the insurer or insurers the amount of his interest, meaning that, whether there is one or many insurers, he can only recover from all or any the amount or value of his interest.

This raises a question which does not appear to have come under the consideration of the courts in any of the cases which were cited, and seems to depend upon the meaning of the Legislature in the use of the words "insurer or insurers" in the 3d section of the Act. It was said that, in the use of the word "insurers" in the plural as well as the word "insurer" in the singular, the Legislature may have intended that, whether there were many insurances or only one, the person insuring should only receive the amount of his interest in the life insured; on the other hand it is said by the plaintiff that in the use of the word "insurers" the Legislature must be understood to have contemplated the case of several persons being insurers in one policy, and intended that the insured should receive no more upon any policy or policies, whether granted by one or more, than the amount of his insurable interest.

Looking to the declared object of the Legislature, we are of opinion that though, upon a life policy, the insurable interest at the time of the making the policy, and not the interest at the time of the death, is to be considered, it was intended by the 3d section of the Act that the insured should in no case recover or receive from the insurers (whether upon one policy or many) more than the insurable interest which the person making the insurance had at the time he insured the life. If for greater security he thinks fit to insure with

many persons and by different contracts of insurance, and to pay the premiums upon each policy, he is at liberty to do so, but he can only recover or receive upon the whole the amount of his insurable interest, and if he has received the whole amount from one insurer he is precluded by the terms of the 3d section of the statute from recovering or receiving any more from the others. Any argument arising from the supposed hardship of allowing the insurers in such a case to receive and retain the premiums without being obliged to pay the consideration for which such premiums were paid, would be equally applicable to the case of marine insurances, upon which, however many policies there may be, the underwriters are only liable to the extent of the value insured.

We are, therefore, of opinion that the second plea is good, and that it was proved upon the trial, and that the defendant is entitled to judgment upon the demurrer, and also to have the verdict entered for him upon the second plea.

Rule absolute to enter the verdict for the defendant on the second plea. Judgment on the demurrer for the defendant.

WORTHINGTON v. CURTIS.

(Court of Appeals, 1875. L. R. 1 Ch. Div. 419.)

This was an appeal from a decision of Vice-Chancellor Bacon.

The principal question in the suit related to the right to a sum of £500, being the money received in respect of a policy of assurance in the Rock Life Assurance Office on the life of George Curtis the younger, the intestate, whose estate was being administered in the suit.

The policy was effected by his father, George Curtis the elder, in the year 1862. The circumstances under which this was done were set forth in the father's affidavit. He stated that he was indebted to his son in a sum of £400, being a legacy bequeathed by his aunt, and that, on his offering to pay the sum, his son demurred to receive it, on the ground that his father had been at great expense in his education and advancement. The affidavit proceeded as follows: "It was ultimately arranged between my said son and me that I should pay to him the said sum of £400, and that in consideration of such payment I should at my own cost and for my own benefit effect a policy of assurance on his life for £500; and in consequence of this arrangement I did, in the said month of April, 1862, pay to him the said sum, and soon afterwards I entered into correspondence with the actuary of the Rock Assurance Company for a policy of assurance on the life of my said son, and received a letter from him which was in the words and figures following," etc.

This letter was dated the 21st of July, 1862. After making an ap-

pointment for the attendance of the son at the office, it contained the following sentence: "I enclose you a proposal on own life, also nominee, should that form be required, and if you will kindly return one of them filled up to me I will apply to his referees, neither of which is required to be of the medical profession."

Mrs. Curtis, the wife of George Curtis the father, also filed an affidavit, in which she stated that she was present at the conversation between her husband and the intestate respecting the insurance of his life, and confirmed the account given of it by her husband.

The Rock office accepted the life of George Curtis the son, and the policy was accordingly effected as a policy in favour of the executors and administrators of the son. It was sent direct to the father, and he regularly paid the premiums out of his own money.

George Curtis the son died in April, 1871, intestate. The Rock office required letters of administration to the son to be taken out. This was accordingly done by his father, and the office then paid the policy to the father and took his receipt.

The plaintiffs claimed to be creditors of George Curtis the son, and filed the present bill against George Curtis the father for the administration of his son's estate. The Chief Clerk allowed their claim for £550.

When the suit came on for further consideration the Vice-Chancellor held that the policy moneys belonged to the father for his own benefit, and from this decision the plaintiffs appealed.

The defendant gave notice that at the hearing of the appeal he should contend, by way of cross-appeal, that the plaintiffs had not established their debt against the intestate's estate.

MELLISH, L. J. This is an appeal from part of an order of Vice-Chancellor Bacon, by which he declared the defendant absolutely entitled to the proceeds of a policy of assurance on the life of George Curtis his son, the intestate in the cause. There has been a notice by way of cross-appeal, in which our judgment is asked whether the appellants, who are creditors of the intestate, have made out their debt. Taking this question first, we are all of opinion that there is no reason for thinking that the chief clerk came to a wrong conclusion. He had the books before him, and found that the debt was established; and we see no reason to differ from him.

That being so, the question is, whether a policy of assurance which was effected by the father on the life of his son, and in his son's name, was the son's policy or the policy of the father, who is his administrator, and claims it, not as administrator, but on the ground that he is the person, as between himself and his son, who is entitled to the money.

In the first place, we must consider the question of fact, whether the defendant has given sufficient evidence that as between himself and his son it was really intended that the policy should be for the benefit of the defendant. On that point we have the defendant's af-

fidavit that he owed £400 to his son on account of a legacy which the defendant had received, and that when he offered to pay it to his son his son demurred to receive it, on account of the expense to which his father had been put in his education. The affidavit then proceeds to state that an arrangement was made between them as follows: [His Lordship read the passage in the affidavit set forth above.] Here he alleges in distinct terms that the policy was effected for his own benefit; and this statement is confirmed by his wife. If the case stood on probability, I should have been of opinion that the father probably intended it for his son's benefit; and that is the presumption of law; but, on the other hand, as it is sworn by the father that he effected the policy on his own account, and this is confirmed by the evidence of his wife, and as for a period of nearly ten years he regularly paid the premiums and kept the policy in his own possession, we think there is no sufficient reason for differing from the conclusions arrived at by the Vice-Chancellor, that as between the father and the son the policy was the property of the father.

It was, however, contended on behalf of the appellants, that, assuming the policy to be the property of the father, it would follow that it was an illegal policy within the statute of 14 Geo. 3, c. 48, because, although it was made in the name of the son, the father, who really effected it for his own benefit, had no insurable interest in his son's life. I agree that even if the story told by the father is true as to the expense to which he had been put in his son's education, that gave him no such interest in his son's life as would support the policy; and I am therefore of opinion that the insurance company would have had a good defence under the Act if an action had been brought against them on the policy. But although the company had sufficient knowledge of the circumstances to call their attention to the question, they acted as insurance companies usually do, and never attempted to set up this defence, and when administration to the son was taken out by the father they paid the money without further dispute to him. The question, then, is, whether the money having been so paid, it is part of the intestate's assets, or belongs to the father.

Now the creditors are claiming under the son, and they can have no greater right to the money than the son had when alive. They claim through him in the same way as executors or trustees in bankruptcy, and have no greater right than the testator or the bankrupt in ordinary cases. This case, therefore, really depends on the question whether, as between the father and the son, the policy belonged to the one or the other. I think it clearly belonged to the father. One test of this is whether, if the son had brought an action of detinue for the policy against the father, he could have recovered it on the ground that the father had no right to it by reason of the statute of Geo. 3? Clearly not. It did not belong to the son but to the father, who had obtained it from the company, and had paid the premiums

out of his own money. Again, if the father had wished to surrender it to the company for a valuable consideration, could the son have interfered to prevent him from carrying the surrender into effect? Could he have brought an action for money had and received to recover the amount paid by the company on such a surrender, or could he have maintained a suit in equity to restrain the transaction from being completed? Clearly not. He had nothing to do with it; both the policy and the value of it belonged to the father.

Then the son dies, and the money becomes payable on the policy. Assuming that a creditor, instead of the father, had taken out administration, could he have maintained an action of detinue against the father for the policy? Certainly not. He would have been in the same position as the son before his death, and the son having no property in the policy his administrator would have had no right to it either. Then, supposing the company chooses voluntarily, and without taking advantage of the statute, to pay the money to the father—I say voluntarily, because neither party could have maintained an action against the company—could the administrator of the son have recovered the money from the father? Clearly not.

In my opinion, therefore, there are two reasons for which the appeal must fail. First, because the statute is a defence for the insurance company only, if they choose to avail themselves of it. If they do not, the question who is entitled to the money must be determined as if the statute did not exist. The contract is only made void as between the company and the insurer. And, secondly, if that is not so, and if the effect of the statute is that the Court will give no relief to any party because of the illegality of the transaction, in that case the maxim, "melior est conditio possidentis," must prevail, and the party who has the money must keep it. On both these grounds, but especially on the first, I think the conclusion of the Vice-Chancellor was right, and this appeal must be dismissed with costs.

JAMES, L. J., and BAGGALLAY, J. A., concurred.

LORD v. DALL.

(Supreme Judicial Court of Massachusetts, Suffolk, 1815. 12 Mass. 115, 7 Am. Dec. 38.)

Assumpsit on a policy of insurance, made for $5000, in favor of the plaintiff, upon the life of Jabez Lord, her brother, aged thirty-three years, bound on a voyage to South America, or any other place he might proceed to from Boston, commencing the risk on the 16th of December, 1809, at noon, and to continue until the 16th of July, 1810, at noon; for a premium of seven per cent. The defendant underwrote the sum of $500.

At the trial of the cause upon the general issue, at the last November term, before the chief justice, it was proved, that the said Jabez

had died, on the coast of Africa, before the expiration of the time for which his life was insured, and not from any of the causes excepted from the risk.

It was also proved that the said Jabez sailed from Boston, after the making of the policy, to Fayal, as supercargo of a vessel called the Mount Ætna, at which place she was converted into a Portuguese vessel, called the Vincidero, still belonging to the former owners, but sailing with Portuguese papers, and under Portuguese colors. From Fayal the vessel sailed to Madeira, and from thence to the coast of Africa, for the purpose of procuring slaves, with intention to carry them to South America; the said Jabez acting as supercargo, and having purchased some of the slaves himself.

The objections made at the trial to the plaintiff's recovery were,

1. That she had no insurable interest in the life of the said Jabez. But, it being in evidence that she was a person of no property at the time, depending altogether upon the said Jabez for her support and education, and he having for several years paid her board, provided her with clothing, and paid for her education; all which he continued to do at the time the policy was effected; this objection was overruled, but reserved for the consideration of the whole court.

2. That there was a concealment of the intention of the said Jabez to go to the coast of Africa. This was left to the jury, with directions, if they were satisfied that there had been such concealment, to find for the defendant.

3. The third objection was, that the policy was void, it being to secure the life of the said Jabez, while in the execution of an unlawful enterprise.

It was not made certain, whether the said Jabez originally designed to go to the coast of Africa, or whether that voyage was conceived after the vessel left Boston. The jury were instructed, that, if they believed that he had such intention originally, and knew that the vessel was so bound, there could be no doubt, from the evidence in the case, that such intention and knowledge were concealed. The question, therefore, which the judge states to be reserved for the consideration of this objection, was, whether the actual going upon a voyage for the purposes aforesaid, by the party whose life is insured, avoids the policy.

The said Jabez Lord gave his note for the premium; and there was no evidence that the plaintiff knew where the said Jabez was bound.

If the court should be of opinion that the plaintiff had not an insurable interest, or that the policy was void on account of the illegality of the voyage, the verdict returned for the plaintiff was to be set aside, and she was to become nonsuit; otherwise, judgment was to be rendered on the verdict.

PARKER, C. J. It has been a question in the argument, whether a policy of assurance upon a life is a contract, which can be enforced

by the laws of this state; the law of England, as it is suggested, applicable to such contracts, never having been adopted and practised upon in this country.

It is true, that no precedent has been produced from our own records, of an action upon a policy of this nature. But whether this has happened from the infrequency of disputes which have arisen it being a subject of much less doubt and difficulty than marine insurances, or from the infrequency of such contracts, it is not possible for us to decide. By the common principles of law, however, all contracts fairly made, upon a valuable consideration, which infringe no law, and are not repugnant to the general policy of the laws, or to good morals, are valid, and may be enforced, or damages recovered for the breach of them.

It seems that these insurances are not favored in any of the commercial nations of Europe, except England; several of them having expressly forbidden them, for what reasons, however, does not appear; unless the reason given in France is the prevailing one, namely, "that it is indecorous to set a price upon the life of a man, and especially a freeman, which, as they say, is above all price." It is not a little singular, that such a reason should be advanced for prohibiting these policies in France, where freedom has never been known to exist, and that it never should have been thought of in England, which for several centuries has been the country of established and regulated liberty.

This is a contract fairly made; the premium is a sufficient consideration; there is nothing on the face of it, which leads to the violation of law; nor any thing objectionable on the score of policy or morals. It must, then, be valid to support an action, until something is shown by the party refusing to perform it, in excuse of his nonperformance.

It is said, that, being a contract of assurance, the law on the subject of marine insurance is applicable to it; and, therefore, unless the assured had an interest in the subject-matter insured, he is not entitled to his action.

This position we agree to; for, otherwise, it would be a mere wager-policy, which we think would be contrary to the general policy of our laws, and therefore void. Had, then, the plaintiff an interest in the life of her brother, which was insured?

The report states the facts, upon which that interest was supposed at the trial to exist. The plaintiff, a young female without property, was, and had been for several years, supported and educated at the expense of her brother, who stood towards her in loco parentis. Nothing could show a stronger affection of a brother towards his sister, than that he should be willing to give so large a sum to secure her against the contingency of his death, which would otherwise have left her in absolute want. One per cent. per month upon $5000,

taken on the life of a man of thirty-three years of age, in good health at the time, was a sufficient inducement to the underwriter to take at least common chances, and proved the strong disposition of the brother to secure his sister against the melancholy consequence to her of his death. In common understanding no one would hesitate to say, that in the life of such a brother the sister had an interest; and few would limit that interest to the sum of $5000.

But, it is said, the interest must be a pecuniary, legal interest, to make the contract valid; one that can be noticed and protected by the law; such as the interest which a creditor has in the life of his debtor, a child in that of his parent, &c. The former case, indeed, of the creditor would leave no room for doubt. But with respect to a child, for whose benefit a policy may be effected on the life of the parent, the interest, except the insurable one which may result from the legal obligation of the parent to save the child from public charity, is as precarious as that of a sister in the life of an affectionate brother. For, if the brother may withdraw all support, so may the father, except as before stated. And yet a policy effected by a child upon the life of a father, who depended on some fund terminable by his death to support the child, would never be questioned; although much more should be secured than the legal interest which the child had in the protection of his father. Indeed we are well satisfied that the interest of the plaintiff in the life of her brother is of a nature to entitle her to insure it. Nor can it be easily discerned, why the underwriters should make this a question after a loss has taken place, when it does not appear that any doubts existed when the contract was made; although the same subject was then in their contemplation.

As to the other objection, that the life insured was employed, during the continuance of the contract, in an illegal traffic, we do not think it can prevail to the prejudice of the plaintiff, who did not participate in the illegal employment, and, indeed, does not appear to have known of it.

The underwriters insure the life of Jabez Lord, for the benefit of the plaintiff, for the term of seven months; and he is described in the policy as being about thirty-three years of age, "and bound on a voyage to South America or elsewhere, and any other place he may proceed to from Boston." This gave the utmost latitude to Jabez Lord, to go where he pleased at all times, and imposed no restriction whatever upon him, as to the place where he should exercise his industry and enterprise. Possibly, if he secretly intended, at the time the policy was subscribed, to visit some portion of the globe, where his life would be exposed to more than common hazard, and kept that intention concealed from the underwriters; had he been interested himself in the policy, or had his sister been privy to his intentions, and aided him in concealing them, such conduct might have

been considered in the light of a fraudulent concealment; and, if the fact were material, the contract might have been avoided.

But the jury have found, that there was no such concealment; and the objection now rests entirely upon the supposed illegality of the enterprise in which he was engaged.

It is a sufficient answer to this objection, that, whatever the law may be as to an insurance upon an illicit voyage, between the parties to the contract, the present plaintiff, being ignorant of any intended violation of the law, ought not to be affected by such illegality. Had the policy been effected for Jabez Lord himself, it might be questionable, as the underwriters had excepted no particular employment in which he might be engaged, and no cause of death but suicide and forfeiture of life for crime, whether his engagement in any traffic prohibited by law would have discharged their liability. If it would, it must be only because it might be thought just and legal to discourage contracts, which might tend to uphold enterprises forbidden by the laws.

It would be difficult, however, to maintain, that the executors of a man, whose life was insured for the benefit of his children, should be deprived of their right to enforce the contract because he had pursued a course of smuggling or counterfeiting; neither of these acts being excepted in the policy, and the party having died within the time, from a cause which was clearly at the risk of the underwriters. A policy made for the purpose of enabling a man to commit crimes would undoubtedly be void. But one honestly made would seem not to be affected by the moral conduct of the party who had procured it.

Perceiving nothing in this contract unfriendly to the morals or interests of the community; and no knowledge of an illegal intention being imputed to the plaintiff; we see no reason for setting aside the verdict. Judgment will therefore be entered upon it.[40]

BARNES v. LONDON, EDINBURGH & GLASGOW LIFE INS. CO.

(High Court of Justice, Queen's Bench Division, 1892. 1 Q. B. 864.)

Appeal from a decision of the judge of the Leeds County Court. The action was brought to recover £21. 10s., the amount of a policy of insurance effected by the plaintiff upon the life of her step-sister. The insurance was effected in November, 1889, when the child was ten years old; the child died in May, 1891. At the trial before the learn-

[40] See, in accord, Ætna Life Ins. Co. v. France, 94 U. S. 561, 24 L. Ed. 287 (1876), Phillips' Estate, 238 Pa. 423, 86 Atl. 289, 45 L. R. A. (N. S.) 982 (1913), and comment in 26 Harvard L. Rev. 756.

ed county court judge, the plaintiff stated in her evidence that she had promised the child's mother before she died that she would take care of the child, and help to maintain her, and no evidence was called to contradict this statement. It was also stated that after her mother's death the child lived near, but not with, the plaintiff. No objection was taken that the plaintiff had not in fact spent any money upon the child. or as to the amount (if any) expended by her; and the learned judge held that the plaintiff had an insurable interest in the child's life, and was entitled to recover the amount of the policy. Other points, including misrepresentation on the part of the plaintiff as to the state of the child's health and misrepresentation by the defendants' agent, were taken, and decided in favour of the plaintiff; but it is unnecessary in this report to state the facts upon these points, as the question of insurable interest was the sole question of law raised upon the appeal.

Lord COLERIDGE, C. J. I am of opinion that this appeal must be dismissed. The facts are simple. The person insured was a little girl of ten, and the plaintiff, who effected the insurance for her own benefit, was her step-sister; the child had no mother, although her father was apparently alive; this, however, is not clear upon the evidence. The evidence of the plaintiff was to the effect that she had promised her mother that she would maintain and keep the child; and there was evidence that she had undertaken that burden. That was a duty not cast upon her by law, but was wholly self-imposed; and in carrying out her undertaking the plaintiff might have had to pay for the education and maintenance of the child, possibly also for its burial. In that state of circumstances it is said that the plaintiff had no insurable interest in the child's life. Now, I agree that the insurable interest must be a pecuniary interest, and that the interest must be in existence at the time when the policy is effected; that is perfectly clear upon the authorities. Is there such pecuniary insurable interest here? I think there is. The expenses to which the plaintiff undertook to put herself for the maintenance of the child were, as I have said, not expenses which she was bound to incur; and in my judgment the plaintiff undoubtedly had an insurable interest in the child's life so far as to secure the repayment of the expenses incurred by her.

I cannot find that anything has been said in any case to a contrary effect. Taking the ordinary course of business as the guide to determine the law, I should have thought that it was a matter of common knowledge that obligations of this sort were obligations the repayment of which was habitually secured in this way. In my judgment the plaintiff had an insurable interest in the child's life, at least up to the amount of the payments actually made by her on the child's account. No point was taken before the county court as to whether any money had been paid by the plaintiff, or as to the amount, if any,

paid by her. The question of amount is, therefore, not before us; and on the point of law we must uphold the judgment of the county court judge.[41]

Appeal dismissed.[42]

SCHWERDT v. SCHWERDT.

(Supreme Court of Illinois, 1908. 235 Ill. 386, 85 N. E. 613.)

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Lake County; A. H. Frost, Judge.

Action by John C. Schwerdt against John H. Schwerdt. From a judgment for defendant on demurrer, plaintiff appealed to the Appellate Court, where the judgment was affirmed, and plaintiff appealed on a certificate of importance, the amount involved being less than $1,000. Affirmed.[43]

The declaration sets forth a written contract wherein the defendant promised to pay a certain sum weekly toward the maintenance of his father, the plaintiff, and alleges a breach of this contract, with damages of $765. The consideration alleged for the defendant's promise was the permission given by the plaintiff to the defendant to insure the life of plaintiff's wife, who was defendant's mother, in the sum of $5,000. Such a policy was taken out by the defendant, and, upon the death of his mother, paid in full to him.

SCOTT, J. The circuit court and the Appellate Court regarded the declaration herein as obnoxious to a demurrer, for the reason that it appeared upon the face of the pleading that the undertaking of the son was without consideration. The declaration expressly avers that the consideration for the promises of the son was a mutual agreement entered into between father and son about 15 years prior to the beginning of this action. This agreement provided that the son should take out a policy of life insurance on the life of his mother, the proceeds of the policy, when collected, in case the father survived the mother, to be used towards the support of the father during the remainder of his life, and it was further averred that the agreement in reference to the policy was carried out, and that about one year after its issuance the mother died and the son received the proceeds of that policy and retained the same for his own use.

The father and son agree in this action that the son had no insurable interest in the life of the mother. The father contends, how-

[41] The concurring opinion of A. L. Smith, J., is omitted.

[42] See Harse v. Pearl Life Assurance [1903] 2 K. B. 92, 96 (S. C., [1904] 1 K. B. 558), explaining the principal case; also Thomas v. National Benefit Ass'n, 84 N. J. Law, 281, 86 Atl. 375, 46 L. R. A. (N. S.) 779 (1913), in which it was held that the plaintiff had an insurable interest in the life of her adult foster daughter.

[43] The statement of facts is much abbreviated.

ever, that as the son had no insurable interest in the life of the mother, and that as the father had an insurable interest in her life, the son, by the agreement in reference to the policy, received from the father a valuable insurable interest in the life of the mother, which was a sufficient consideration for the agreement. That agreement between the father and son vested no insurable interest in the life of the mother in the son, and left in the father all the insurable interest in the life of the mother that he had before the agreement was made. Under these circumstances, it is apparent that the agreement between the father and son as to taking the insurance policy conferred no benefit of any character upon the son and did not visit any injury or disadvantage upon the father or fasten any liability upon him. That agreement did not aid or assist the son in securing the policy, and the father did not forego any right possessed by him. That agreement, therefore, afforded no consideration for the undertaking of the son upon which this action was brought. The question of the son's right to the insurance money was one for the son and the insurance company, and did not concern the father. Johnson v. Van Epps, 110 Ill. 551.

It is then urged that the liability of a son to support an indigent parent, as fixed by section 1, c. 107, Hurd's Rev. St. 1905, affords a sufficient consideration for the undertaking declared upon. To this there are at least two insuperable objections: First, it affirmatively appears from the declaration that such was not the consideration for this undertaking; and, second, it does not appear from the declaration that at the time the undertaking was entered into by the son the father was a poor person or a pauper. For aught that is averred, he may at that time have been the owner of a competence.

It is then said that this contract is sufficiently supported by a moral consideration, viz., the agreement in reference to the insurance policy and the receipt by the son of large benefits from that policy. The only moral obligation which affords consideration for a promise is one which has at some time been a legal duty. No such moral obligation here appears.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

WOODS et al. v. WOODS' ADM'R.

(Court of Appeals of Kentucky, 1908. 130 Ky. 162, 113 S. W. 79, 19 L. R. A. [N. S.] 233.)

Appeal from Circuit Court, Shelby County.

Petition by H. C. Riner, administrator of Sarah E. Woods for advice as to the distribution of the proceeds of her life policy, to which Joe Woods and another filed a counterclaim and cross-petition. From a judgment awarding cross-petitioners insufficient relief, they appeal. Reversed and remanded, with directions.

CLAY, C. Sarah E. Woods died intestate on the 14th of March, 1907, leaving as her heirs at law the appellants, Joe Woods and Sam Woods, and the appellees, Oad Woods, Arthur Woods, Mary Woods, and others. In the year 1901 she had her life insured in the Equitable Life Assurance Society in the sum of $10,000. At the time she obtained the policy of insurance she entered into a contract with appellants, Joe Woods and Sam Woods, by which it was agreed that they should pay the insurance premiums on the policy, and in consideration thereof they should be entitled to the proceeds at her death. At the same time they entered into an agreement with George T. Woods, a nephew of Sarah E. Woods, by which he agreed to furnish appellants one-third of the premiums due on the policy, and in consideration thereof was to share in one-third of the proceeds.

Upon the death of Sarah E. Woods the Equitable Life Assurance Society paid the $10,000 to H. C. Riner, who had qualified as her administrator. He instituted this action in the Shelby circuit court for the purpose of obtaining the advice and direction of the court as to how the fund should be distributed and to whom paid. To this petition Joe Woods and Sam Woods by answer, counterclaim, and cross-petition set up the agreement above referred to, alleged that they had paid the annual premium of $579.50 for the years 1900, 1901, 1902, 1903, 1904, 1905, and 1906, and asserted claim to the entire proceeds of the policy of $10,000. To this a reply was filed by the other heirs, the appellees herein, in which they claimed that the agreement between appellants and their mother was procured by fraud, that she was not mentally capable of entering into an agreement, and that appellants had no insurable interest in the life of their mother.

On submission of the case the trial court rendered an opinion and judgment based thereon, by which it was held that the policy was issued on the life of Sarah E. Woods, payable by its terms at her death to her estate; that a written contract was entered into between her and two of her sons, the appellants, by which they were to pay the yearly premiums, and be the beneficiaries of the policy; that these sons made an agreement with George T. Woods, by which he was to receive one-third of the proceeds of the policy, upon paying to them one-third of the premiums; that the premiums were all paid by the appellants; that George T. Woods, and his administrator after his death, paid to the appellants one-third of the premiums. The court then directed that the administrator pay to the appellants the premiums paid by them on the policy, with interest thereon from the dates of the respective payments until paid; that the balance of the $10,000 was a part of the estate of Sarah E. Woods, and was ordered to be held and so accounted for by the administrator. From the judgment so entered, this appeal is prosecuted.

The trial court seems to have disregarded the plea of fraud and of mental incapacity, and we think properly so. The evidence in this case conduces to show that Sarah E. Woods was a woman of fine common sense, and that she knew how to attend to and manage her own affairs. When she took out the policy she understood perfectly well the nature of the contract which she had made with appellants. There is also evidence to the effect that the same privilege, of taking out insurance on her life, was accorded to her other children, but that they failed to avail themselves of it. All along they knew of the existence of the policy in question and of the fact that appellants were paying the premiums thereon in pursuance of the contract by the terms of which they expected to secure the proceeds. However, the trial court held that appellants, who were the sons of Sarah E. Woods, had no insurable interest in the life of their mother. The court seems to have proceeded upon the idea that some other element, such as that of support or a pecuniary interest in the life of the mother, was necessary in addition to the relationship which existed between the mother and her sons.

Appellees below seem to have relied, and the court itself appears to have based its opinion upon the doctrine laid down in the case of Life Insurance Company v. O'Neill, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225. In that case it was decided by the Circuit Court of Appeals that "an adult son has not, from the bare fact of relationship, an insurable interest in the life of his father." This case followed the English doctrine. The latter doctrine, however, was based upon the statute 14 Geo. III, c. 48, which provided that, to support insurance on the life of another, there must have been a pecuniary interest on the part of the insured in the life of the assured, and the interest ordinarily growing out of relationship or consanguinity is not alone sufficient. Although having no similar statute, the courts of several states have adopted the English doctrine. With all due deference to the courts thus holding, we are of the opinion that the rule announced by them does not accord with the weight of authority, and is not based upon sound reasoning.

In the recent case of Hess' Adm'r v. Segenfelter, etc., 127 Ky. 348, 105 S. W. 476, 32 Ky. Law Rep. 225, 14 L. R. A. (N. S.) 1172, 128 Am. St. Rep. 343, this court, in discussing the question of insurable interest, said:

"It has been held a son has an insurable interest in the life of his father (Reserve Mutual Life Ins. Co. v. Kane, 81 Pa. 154, 22 Am. Rep. 741); a father has an insurable interest in the life of his child (Williams v. Washington Life Ins. Co., 31 Iowa, 541); sisters and brothers have an insurable interest in the life of each other (May on Insurance, § 107); a wife has an insurable interest in the life of her husband, and a husband in the life of his wife (Currier v. Continental Life Ins. Co., 57 Vt. 496, 52 Am. Rep. 134;

Ky. St. 1903, § 654); a person dependent upon the life of another has an insurable interest in that life (Lord v. Dall, 12 Mass. 115, 7 Am. Dec. 38); a granddaughter has not an insurable interest in the life of her grandfather, nor has a nephew, as such, an insurable interest in the life of an aunt, nor a son-in-law an insurable interest in the life of his mother-in-law (May on Insurance, § 107). In Singleton v. St. Louis Ins. Co., 66 Mo. 63, 27 Am. Rep. 321, an uncle was held not to have an insurable interest in the life of his nephew. In Burton v. Connecticut Mut. Life Ins. Co., 119 Ind. 207, 21 N. E. 746, 12 Am. St. Rep. 405, the court held that a grandchild had no insurable interest in the life of his grandfather. A stepson has no insurable interest in the life of his stepfather, where he has a separate home and family of his own. United Brethren Mutual Aid Society v. McDonald, 122 Pa. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. Rep. 111.

"These authorities illustrate the limitations that have been placed on insurable interest, and the extent to which the courts have gone in an effort to prevent wagering and speculative contracts of insurance. Although an examination of them will show various reasons for the conclusion reached, it may safely be said that the relationship of creditor and debtor must exist, or that the beneficiary must have or expect some pecuniary relief, benefit, or advantage from the continuance of the life of the insured, or the relationship growing out of ties of blood or marriage must be so close as to justify the well-founded belief that loss or disadvantage would naturally and probably arise to the party in whose favor the policy is written from the death of the person whose life is insured. Generally, the courts have endeavored to make insurable interest dependent on the question that pecuniary loss would presumably result to the beneficiary from the death of the insured; but, where the relationship, as in the case of husband and wife, parent and child, sister and brother, is so close as to preclude the probability that mercenary motives would induce the sacrifice of life to gain the insurance, the element of pecuniary consideration is not deemed essential to sustain the validity of the policy."

Prior to the above opinion the doctrine that a son had an insurable interest in the life of his parent was recognized in Beard v. Sharp, 100 Ky. 606, 38 S. W. 1057. In Warnock v. Davis, 104 U. S. 779, 26 L. Ed. 926, the rule is thus stated: "It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration."

In 25 Cyc. p. 704, the doctrine is thus laid down: "It has some-

times been said in definite terms that the relationship of parent and child, without right or liability as to support, and without other direct pecuniary interest, is not sufficient to sustain a policy taken by one on the life of the other. But a more liberal rule seems to be supported by many authorities, in accordance with which such relationship is sufficient in itself to show such interest as will support a policy by the one on the life of the other."

Among the cases recognizing this doctrine may be cited the following: Valley Mutual Life Association v. Teewalt, 79 Va. 423; Reserve Mutual Insurance Co. v. Kane, 81 Pa. 154, 22 Am. Rep. 741; Equitable Life Insurance Co. v. Hazelwood, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893; Tucker v. Mutual Benefit Life Co., 121 N. Y. 718, 24 N. E. 1102; Trenton Mutual Life Insurance Co. v. Johnson, 24 N. J. Law, 576; Hilliard v. Sandford, 4 Ohio N. P. 363.

In speaking of the duties due from children to their parents, Blackstone (1 Lewis' Ed. p. 428) says: "The duties of children to their parents arise from a principle of natural justice and retribution; for to those who gave us existence we naturally owe subjection and obedience during our minority, and honor and reverence ever after. They who protected the weakness of our infancy are entitled to our protection in the infirmity of their age. They who by sustenance and education have enabled the offspring to prosper ought in return to be supported by that offspring in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents, which are enjoined by positive laws."

It may be safely said that no relationship in life, arising from ties of blood, is more sacred or more binding than that of parent and child. As the mother looks into the eyes of her child and uses every effort to guard it from harm and prolong its life, so the child as maturity comes raises a strong arm to protect her in her old age, and looks with fear to the time when she will be taken away. Thus every common instinct, to say nothing of love and affection, makes each interested in the long life of the other. With such a tie uniting parent and child, we cannot accede to the doctrine that some pecuniary loss or disadvantage must result to the son from the death of his mother in order that he may be interested in the continuation of her life. We, therefore, conclude that the relationship between parent and child is of itself sufficient to give either an insurable interest in the life of the other, and that no other element is required.

Nor do we think the fact that appellants entered into a contract with George T. Woods, by which he was to furnish one-third of the premiums and to share in one-third of the proceeds of the policy, had the effect of invalidating the policy so far as the appellants are concerned. This precise question was before this

court in the case of Beard v. Sharp, supra. There the son had for a number of years paid the premium on the policy of insurance on the life of his mother issued for his benefit. After paying several premiums he caused a new certificate to be issued, making himself and a stranger joint beneficiaries, the stranger agreeing to pay the premiums. This court held that the son was entitled to the whole amount of the proceeds of the policy, less the premiums paid by the stranger, with the interest thereon, and further held that the insurance was not invalidated by the designation of a person prohibited by law from being a beneficiary. Indeed, it may be said to be the general rule that a contract of insurance is not invalidated by the designation of a person prohibited by law to be a beneficiary. Caudell v. Woodward, 96 Ky. 646, 29 S. W. 614; Weigelman v. Bronger, 96 Ky. 132, 28 S. W. 334; Warnock v. Davis, 104 U. S. 775, 26 L. Ed. 924.

Being of the opinion that Sarah E. Woods was mentally capable of contracting, and that no fraud was practiced, either upon her or appellees herein, in securing the contract of insurance, that the subsequent contract made by appellants with George T. Woods did not affect the validity of the policy, or appellant's interest therein, and that the relationship existing between appellants and their mother was sufficient, in and of itself, to give them an insurable interest in her life, we therefore conclude that appellants are entitled to the whole proceeds of the policy.

For the reasons given, the judgment is reversed, and cause remanded, with directions to enter judgment in conformity with this opinion.[44]

[44] The general rule undoubtedly is that an adult child has no insurable interest in the life of a parent, even though the moral burden of support and burial rests upon such child. See Harse v. Pearl Life Assur. Co. [1893] 2 K. B. 92, reversed on another point, (C. A.) [1894] 1 K. B. 558, and extensive note, 54 L. R. A. 225.

"It is next insisted that Norman S. Hahn, a brother of Isaiah Hahn, had no insurable interest in the life of the latter. It is well settled in this state that an insurable interest may arise from blood relationship, without regard to whether or not the beneficiary has any pecuniary interest in the life of the insured, or is dependent upon the latter. Basye v. Adams, 81 Ky. 368 (1883). It is true that under the English rule blood relationship alone is not sufficient, but that rule is based upon a statute which is not in force in this state, nor, as a matter of fact, in force in many of the states which follow the English rule. If blood relationship in and of itself constitutes an insurable interest, certainly the relationship of one brother to another is sufficiently close for that purpose." Hahn v. Supreme Lodge, 136 Ky. 823, 125 S. W. 259 (1910). This statement, however, was not really necessary to the decision of the case, since the policy was taken out by the insured upon his own life. Dicta to the same effect may also be found in Neal v. Shirley, 137 Ky. 818, 127 S. W. 471 (1910), and Buckler v. Supreme Council, 143 Ky. 618, 136 S. W. 1006 (1911).

The peculiar doctrine obtaining in Pennsylvania, whereby a son has an insurable interest in the life of his aged parent, whom he is legally bound to support, is set forth in Reserve Mut. Ins. Co. v. Kane, 81 Pa. 154, 22 Am. Rep. 741 (1876). See, contra, Life Ins. Co. v. O'Neill, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225 (18—).

HESS' ADM'R v. SEGENFELTER et al.

(Court of Appeals of Kentucky, 1907. 127 Ky. 348, 105 S. W. 476, 14 L. R. A. [N. S.] 1172, 128 Am. St. Rep. 343.)

Appeal from Circuit Court, McCracken County.

Controversy between Mary E. Morgan, administratrix, and James W. Segenfelter and others, to determine right to the proceeds of a benefit certificate issued by the Knights of Honor. From a judgment for James Segenfelter and others, Mary E. Morgan appeals. Reversed.

CARROLL, J.[45] C. F. Hess died in 1904, a member in good standing of the Knights of Honor, a corporation created under the laws of the state of Missouri "to promote benevolence and charity by establishing a widows' and orphans' fund from which, on satisfactory evidence of the death of a member of the order who had complied with all its lawful requirements, and who is at the time of his death in good standing according to the laws of the order, a sum not exceeding two thousand dollars shall be paid to said member or members of his family, blood relatives, or person or persons dependent on him, as he may direct or designate by name, to be paid as provided by general law; provided, however, any member desiring to have afterborn children to participate in his certificate may so designate without doing so by name"—the constitution also providing that "a member desiring to change his beneficiary may at any time while in good standing surrender his benefit certificate and obtain a new one in lieu thereof, payable as he shall have directed within the limitations prescribed by the laws of the order." In 1901 Hess surrendered the certificate he then held in this order, payable to his aunt, and upon his request there was issued a certificate for $2,000 payable to the appellees, who are his first cousins.

This controversy is between the appellees and the appellant, Mary E. Morgan, the only surviving sister of Hess, who asserts claim to the fund by reason of her relationship and also as administratrix of his estate. The Knights of Honor paid the money into court, and upon hearing the case the circuit court adjudged that the appellees were entitled to the fund in controversy, and a reversal of this judgment is sought.

For appellant it is urged that appellees had no insurable interest in the life of Hess, and therefore are not entitled to the insurance upon his life under the certificate issued to him by this fraternal organization. The appellees contend that, being blood relatives of Hess, he had the right under the provisions of the charter before quoted to designate them as the beneficiaries of

[45] Part of the opinion is omitted.

the fund, and the circuit court properly adjudged them entitled to it.

Whether or not a member of a fraternal or benevolent organization who obtains insurance upon his own life and himself pays the premiums can designate as a beneficiary a person who has not what is generally known as an insurable interest in his life, but who is permitted to be made a beneficiary by the charter of the order, presents a most interesting question, and one that has attracted a great deal of attention from courts as well as text-writers. If we did not feel constrained to follow the provisions of the statute that will be hereafter noticed, we would announce the principle that the question of insurable interest was not involved, when a member of a fraternal or benevolent association in good faith obtained insurance upon his own life, and himself paid the premium, and there was no fact or circumstance connected with the transaction tending to show that it had any of the elements of a wagering or speculative contract, and that a person obtaining such insurance might designate any person as a beneficiary within the limits prescribed by the rules of the order. All the courts of last resort, with possibly one exception, and the text-writers on insurance generally, are agreed that a person may take out insurance upon his own life and designate whom he pleases as the beneficiary.

This doctrine is based upon the sound and sensible theory that it is not reasonable to suppose that a person will insure his own life for the purpose of speculation, or be tempted to take his own life in order to secure the payment of money to another, or designate as the beneficiary a person interested in the destruction and not in the continuance of his own life. Vance on Insurance, § 49; Heinlein v. Imperial Ins. Co., 101 Mich. 250, 59 N. W. 615, 25 L. R. A. 627, 45 Am. St. Rep. 409; Morrell v. Trenton Mutual Life Ins. Co., 10 Cush. (Mass.) 282, 57 Am. Dec. 92; Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251; May on Insurance, § 112; Bliss on Insurance, § 76; Bacon on Insurance, § 729; Beach on Insurance, § 861; Joyce on Insurance, § 729; Bloomington Mutual Benefit Association v. Blue, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558; Union Fraternal League v. Walton, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350; Prudential Ins. Co. v. Hunn, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380; N. W. Masonic Aid Ass'n v. Jones, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810; Albert v. Mutual Life Ins. Co., 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693.

On the other hand, what is known as "wagering or gambling insurance" is universally condemned, and our court, in harmony with the doctrine generally prevailing, is strongly committed to the principle that a person cannot himself procure insurance upon a life in which he has not an insurable interest, growing out of

kinship, dependency, or the relation of debtor and creditor, nor obtain an assignment of such insurance; nor will a person be permitted to insure his own life for the benefit of another, if that other induces him to procure the insurance and pays the premiums thereon, or there is any evidence tending to show that the insurance was obtained with a view to avoid or evade the law against speculative insurance. Griffin's Adm'r v. Equitable Assurance Society, 119 Ky. 856, 84 S. W. 1164, 27 Ky. Law Rep. 313; Brombley v. Washington Life Ins. Co., 122 Ky. 402, 92 S. W. 17, 28 Ky. Law Rep. 1300, 5 L. R. A. (N. S.) 747, 121 Am. St. Rep. 467, 12 Ann. Cas. 685; Beard v. Sharp, 100 Ky. 606, 38 S. W. 1057; New York Life Ins. Co. v. Brown, 66 S. W. 613, 23 Ky. Law Rep. 2070; Baldwin v. Haydon, 70 S. W. 300, 24 Ky. Law Rep. 900; Wrather v. Stacey, 82 S. W. 420, 26 Ky. Law Rep. 683; Lee v. Mutual Life Insurance Company, 82 S. W. 258, 26 Ky. Law Rep. 577; Barbour v. Larue, 106 Ky. 546, 51 S. W. 5; Basye v. Adams, 81 Ky. 368; Lockett v. Lockett, 80 S. W. 1152, 26 Ky. Law Rep. 300; Scott v. Scott, 77 S. W. 1122, 25 Ky. Law Rep. 1356; Adams v. Reed, 38 S. W. 420, 18 Ky. Law Rep. 858, 35 L. R. A. 692; Bramblett v. Hargis, 94 S. W. 20, 29 Ky. Law Rep. 610.

Such insurance has a tendency to create a desire to destroy the life of the insured to obtain the insurance, there being no tie of blood, or kindred, or interest, to wish its prolongation; and a person who procures for his benefit insurance upon the life of another, when he is not connected with that life by ties of kindred or dependency, or interested in its continuance from business motives, may be actuated solely by a purpose to derive profit from its destruction, and be rewarded by wagering against the amount payable at his death the sums expected in premiums during his life.

In subdivision 3, art. 4, c. 32, of the Kentucky Statutes of 1903, relating to assessment and co-operative life insurance companies, it is provided, in section 678, that "no corporation doing business under this law shall issue a certificate or policy upon the life of any person more than sixty years of age, nor upon any life in which the beneficiary named has no interest." And, by section 680, an insurance company organized under the laws of any other state for the purpose of furnishing life or accident insurance upon the assessment plan shall not be authorized to do business in this state until it has filed with the commissioner of insurance a certificate showing, among other things, that "its certificates or policies are payable only to beneficiaries having a legal insurable interest in the life of the member or insured." And this court in Supreme Commandery of Golden Cross v. Hughes, 114 Ky. 175, 70 S. W. 405; Ancient Order of United Workmen v. Edwards, 85 S. W. 701, 27 Ky. Law Rep. 469; Supreme Lodge of K. P.

v. Hunziker, 87 S. W. 1134, 27 Ky. Law Rep. 1201, and American Guild v. Wyatt, 100 S. W. 266, 30 Ky. Law Rep. 632, held that section 679 of the subdivision supra applied to fraternal and benevolent associations.

Under the authority of these cases we see no escape from the conclusion that sections 678 and 680, supra, also apply to them. This being true, at the time this contract of insurance was made, and when the insured died, it was contrary to the statute for these associations to issue certificates unless the beneficiary named therein had a legal insurable interest in the life of the insured. The Legislature in 1906, by an act which became a law March 24, 1906 (Laws 1906, p. 481, c. 142), exempted from the operation of the subdivision in question "fraternal societies, lodges or councils, which are under the supervision of a grand or supreme body, and securing members through the lodge system exclusively, and paying no commissions, nor employing any agents except in the organization and supervision of the work of local subordinate lodges or councils." So that, hereafter, members in fraternal and benevolent associations such as the Supreme Lodge of the Knights of Honor will not be limited by statute in the designation of beneficiaries to persons who have an insurable interest in their lives; but this statute has no application to the case before us. The rights of the parties must be adjudged by the laws in force at the time the certificate was issued.

The only remaining question is: Did appellees, who were first cousins of the insured, have, in the meaning of the statute, an insurable interest in his life? It will be observed that the statute does not undertake to define "insurable interest," and we are left to ascertain its meaning by our own conceptions of what is the proper definition of the words, guided by the opinions of courts of last resort and text-writers dealing with the question. * * *

And in Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251, the court said: "It is well settled that a man has an insurable interest in his own life and that of his wife and children, a woman in the life of her husband, and a creditor in the life of his debtor. Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life."

It has been held a son has an insurable interest in the life of his father. Reserve Mutual Life Ins. Co. v. Kane, 81 Pa. 154, 22 Am. Rep. 741. A father has an insurable interest in the life of his child. Williams v. Washington Life Ins. Co., 31 Iowa, 541. Sisters and brothers have an insurable interest in the life of each other. May on Insurance, § 107. A wife has an insurable interest in the life of her husband, and a husband in the life of his wife. Currier v. Continental Life Ins. Co., 57 Vt. 496, 52 Am. Rep.

134; Ky. St. 1903, § 654. A person dependent upon the life of another has an insurable interest in that life. Lord v. Dall, 12 Mass. 115, 7 Am. Dec. 38. A granddaughter has not an insurable interest in the life of her grandfather, nor has a nephew, as such, an insurable interest in the life of an aunt, nor a son-in-law an insurable interest in the life of his mother-in-law. May on Insurance, § 107.

In Singleton v. St. Louis Ins. Co., 66 Mo. 63, 27 Am. Rep. 321, an uncle was held not to have an insurable interest in the life of his nephew. In Burton v. Conn. Mut. Life Ins. Co., 119 Ind. 207, 21 N. E. 746, 12 Am. St. Rep. 405, the court held that a grandchild had no insurable interest in the life of his grandfather. A stepson has no insurable interest in the life of his stepfather, where he has a separate home and family of his own. United Brethren Mutual Aid Society v. McDonald, 122 Pa. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. Rep. 111.

These authorities illustrate the limitations that have been placed on insurable interest, and the extent to which the courts have gone in an effort to prevent wagering and speculative contracts of insurance. Although an examination of them will show various reasons for the conclusion reached, it may safely be said that the relationship of creditor and debtor must exist, or that the beneficiary must have or expect some pecuniary relief, benefit, or advantage from the continuance of the life of the insured, or the relationship growing out of ties of blood or marriage must be so close as to justify the well-founded belief that loss or disadvantage would naturally and probably arise to the party in whose favor the policy is written from the death of the person whose life is insured.

Generally the courts have endeavored to make insurable interest dependent on the question that pecuniary loss would presumably result to the beneficiary from the death of the insured; but where the relationship, as in the case of husband and wife, parent and child, sister and brother, is so close as to preclude the probability that mercenary motives would induce the sacrifice of life to gain the insurance, the element of pecuniary consideration is not deemed essential to sustain the validity of the policy. Looking at the question from any standpoint, cousins, who are not dependent on or creditors of the insured, cannot fairly be said to have an insurable interest in his life.

Wherefore the judgment is reversed, with directions to enter a judgment giving to appellant the insurance.

WESTERN & SOUTHERN LIFE INS. CO. v. GRIMES' ADM'R.

(Court of Appeals of Kentucky, 1910. 138 Ky. 338, 128 S. W. 65.)

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by Sallie Grimes' administrator against the Western & Southern Life Insurance Company on a policy issued to plaintiff's intestate. From a judgment for plaintiff, defendant appeals. Reversed, with instructions to dismiss the petition.

James Quarles and Johnson & Levy, for appellant. Bradford Webster, Samuel L. Trusty, J. Reginald Clements, and Popham, Webster & Trusty, for appellee.

LASSING, J. On January 19, 1906, Sallie Grimes, a girl about 18 years old, in the employ of Jacob Gross, in the city of Louisville, took out a policy of insurance on her life in the Western & Southern Life Insurance Company, and named Dora Gross, wife of her employer, as beneficiary. She had been living in the family for about three years, and previous to that time had been living with the mother of Mrs. Gross since she was about 5 years old. She was evidently warmly attached to Mrs. Gross, and, although working for wages, was treated as one of the family. After the policy was delivered to her, she paid the premiums regularly each week out of her wages until some time in the fall of 1907, when she ceased to work for the Gross family, and sought employment elsewhere. When she left the Gross home, she took with her the policy and the book in which the entries of her weekly payments were kept. Shortly thereafter the collector for the company called at the Gross home, as was his custom, to collect the premium. He was then informed by Mr. Gross that the insured no longer lived there, and directed where he would likely find her. The agent looked her up and was informed by her that she no longer desired to keep the policy in force and would not pay the premiums. Thereupon he returned to see Mr. Gross in an effort to induce him to pay the premiums and keep up the policy on account of his wife, who was named as beneficiary.

After some deliberation this suggestion was adopted, and it was agreed between Gross and the agent of the company that the company would furnish a duplicate policy to be held by Gross, so that he would have something to show for the money which he was paying. This was in time done, and under this agreement and arrangement the premiums were regularly paid by Gross for his wife until in the fall of 1908, when the insured died. Proofs of loss were made out by Gross and delivered to the company, and a few days thereafter the company paid to him for his wife the full amount of

the policy, to wit, $275.40. In due time an administrator was appointed for her, and through his attorney he demanded payment of the policy of the company. This was refused, upon the idea that Mrs. Gross, the named beneficiary, was lawfully entitled to the proceeds of the policy, and the company, having paid her, declined to pay the administrator.

Thereupon this suit was instituted upon the original policy; the duplicate which was in the possession of Mrs. Gross having been surrendered to the company without ever having been in the possession of the insured. The company defended upon two grounds: First, it denied that it had denied payment or refused to pay the lawful beneficiary; and, second, it pleaded the payment to Mrs. Gross as foster mother under the belief that she had an insurable interest in the life of deceased and as she was named as beneficiary in the policy. It asked that Mrs. Gross be made to pay and compelled to respond to any judgment that might be rendered against it. Later defendant sought to have a rule issued against Mrs. Gross requiring her to pay the money which she had received from it into court.

The court refused to issue this rule, and upon defendant's motion its cross-petition, as to Mrs. Gross, was dismissed without prejudice. Issue was joined upon the question of liability, the case prepared, and finally submitted to the court, without the intervention of a jury, for judgment upon the pleadings, exhibits, and proof. The court was of opinion that the contract sued on was a binding obligation on the part of the company, that Dora Gross had no insurable interest in the life of the insured, that the company knew this when it paid her the proceeds of the policy, and that such payment did not discharge its obligation to the lawful claimant. Accordingly, judgment was entered in favor of plaintiff, and the company appeals.

Several grounds are relied upon for reversal, but we will consider only such as, from the conclusion which we have reached, are material and vital to the determination of the case. In Hess' Adm'r v. Segenfelter, 127 Ky. 348, 105 S. W. 476, 32 Ky. Law Rep. 225, 14 L. R. A. (N. S.) 1172, 128 Am. St. Rep. 343, and Rupp v. West. Indemnity Co. (decided April 26, 1910) 138 Ky. 18, 127 S. W. 490, 29 L. R. A. (N. S.) 675, it is held that one having no insurable interest whatever in the life of the insured may be made the beneficiary in a policy where it is applied for by the insured free from any influence exercised by the named beneficiary over the insured to have the insurance taken, and where the premiums are thereafter paid by the insured. As the policy in the case under consideration is shown to have been issued to the insured at her request and without the knowledge of Mrs. Gross, and the premiums were paid thereon by the insured up to the time of her quitting the employ of

Mr. Gross, Mrs. Gross, the beneficiary named therein, was clearly entitled to receive the proceeds of this policy, unless the acts and conduct of Mr. Gross, as husband and agent of his wife, coupled with those of the agent for the company, in having the duplicate policy issued and the premiums thereon paid by Mrs. Gross, or Mr. Gross for Mrs. Gross, after it had become known to them that the insured did not intend to continue the policy longer in force, operated to bring this case within the rule announced in Bromley's Adm'r v. Washington Life Insurance Co., 122 Ky. 402, 92 S. W. 17, 28 Ky. Law Rep. 1300, 5 L. R. A. (N. S.) 747, 121 Am. St. Rep. 467, 12 Ann. Cas. 685. [The court's discussion of this case is omitted.]

In the case under consideration, the insured, after carrying the policy for something over a year, notified both the beneficiary named therein and the agent of the company that she would no longer continue the policy. They each understood that she intended to lapse or drop it. Her relations with the Gross family had changed. She was no longer in their employ, and the inducement for her to keep up the policy was wanting. Although possessed of the knowledge that the insured would make no more payments on the policy, the agent of the company set about to induce Mr. and Mrs. Gross to take up the payment of the premiums and continue the policy in force, in order that Mrs. Gross might get the money. Gross, acting upon this suggestion of the agent, paid the premiums thereafter until the death of the insured. On an application purporting to have been signed by the insured, though not satisfactorily shown to have been so signed, the company issued a duplicate policy, which was held by Gross. This was done at the instance of Gross that he might have something to show for the money which he was paying out. The whole business, in every particular, was engineered and controlled by the husband of the named beneficiary, acting for his wife, and the agent of the company, without the knowledge, acquiescence, or consent of the insured.

Where one has no insurable interest in the life of another, the law will not permit him to take out insurance on such life, and, if he does so, will not lend its aid to the enforcement of such contract because against public policy, and the fact that the insured lends his consent to the transaction adds nothing whatever to its validity. So it becomes immaterial, for the purposes of the case under consideration, whether or not the insured consented to the issual of the duplicate policy. And certainly, if validity could not be given to the contract with her consent, there would be less merit in the claim if the transaction was done without her knowledge or consent.

This case cannot be distinguished in principle from the Bromley Case. No distinction can be drawn between taking out a policy with the consent of the insured and continuing one in force after it

has been repudiated, abandoned, and dropped by the insured.[46] In fact, there is less of merit in the case under consideration than there was in the Bromley Case, for Bromley really received $75 in cash as an inducement to enter into the arrangement; whereas, under the most favorable light in which the present case can be considered, the insured merely consented that Mrs. Gross might carry the insurance on her life. The contract is void and unenforceable as against public policy; and this applies alike to the representative of the insured and the beneficiary named in the original policy.

Of this finding appellee is in no position to complain, for he occupies no better position than the insured—stands in her stead—and she elected to drop the policy, and by nonpayment of dues caused it to lapse. Having accomplished her purpose and lapsed the policy, she could not thereafter successfully claim that the policy was alive and in force by virtue of the act of Mrs. Gross in making payments to the company, for these payments were made, not for the benefit of the insured, or at her instance or request, but solely for the purpose of keeping the insurance in force for the benefit of Mrs. Gross.

Upon this showing the chancellor should have held that the contract of insurance was absolutely void as to all parties concerned, and for his failure so to do the judgment is reversed, and cause remanded, with instructions to dismiss the petition.

REED v. PROVIDENT SAVINGS LIFE ASSUR. SOCIETY OF NEW YORK (REED et al., Interveners).

(Court of Appeals of New York, 1907. 190 N. Y. 111, 82 N. E. 734.)

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Theodore F. Reed against the Provident Savings Life Assurance Society of New York, in which John O. Reed and others intervene. From a judgment of the Appellate Division (112 App. Div. 922, 98 N. Y. Supp. 1111), affirming the judgment of the Special Term, plaintiff and defendant society appeal. Modified and affirmed.

GRAY, J.[47] The facts in dispute have been finally settled by the unanimous affirmance of the judgment. The situation, as presented, is one where the interests of the parties are evident, and but

[46] That the beneficiary has a right to pay premiums due, and thus preserve the policy, see Manhattan Life Ins. Co. v. Smith, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806 (1886); Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251 (1876); McQuillan v. Mut. Reserve Fund Ass'n, 112 Wis. 665, 87 N. W. 1069, 56 L. R. A. 233, 88 Am. St. Rep. 986 (1902).

[47] The facts sufficiently appearing in the opinion, the reporter's statement of facts is omitted.

few questions of law of any importance have survived the disposition made below of this case. In 1887 a contract was made by the plaintiff with Benjamin F. Reed and his children, pursuant to which policies of insurance, to the aggregate amount of $25,000, were to be taken out upon Reed's life, of which his children were to be the principal beneficiaries and they were to be named, as such, in the policies. These policies were to be kept in force until the death of the assured, and the plaintiff agreed to pay all the premiums and assessments. From the proceeds of the insurance he was to be reimbursed the amount advanced by him, with 10 per cent. interest (the legal rate in the state of Michigan, where the contract was made), and, in addition, he was to receive the sum of $5,000; the remainder of the insurance moneys being payable to the children of the assured. This contract was so far carried out that, upon applications signed by the deceased, the plaintiff procured the issuance of four policies, aggregating in amount $25,000, by the Massachusetts Benefit Association, the National Benefit Society, and the Equitable Reserve Fund Life Association; the children being alone named as beneficiaries in two policies issued by the first-named company, and, in those issued by the two latter companies, being jointly named with the plaintiff, who was described as nephew and creditor.

The plaintiff performed his agreement to keep the policies in force by the payment of all premiums, or assessments, and, when the two last-named insurance companies failed in 1889, he procured to be issued, still carrying out the contract, two other policies in their place, one of which, for $10,000, is the one involved in this action. In renewing, however, that particular insurance, the policy was made payable to the plaintiff, or his assigns. At the death of the assured, the policies of life insurance were in force, and $15,000 of their amount have been paid over by the other two insurance companies. The plaintiff collected $5,000, the amount of one of the other policies, and from the proceeds of the other policy for $10,000 he has received with the assent of, or from, the Reed children a sum of money sufficient to reimburse him for his payments of premiums upon the insurance policies, other than the one in question. The Reed children being in this action as parties, the judgment distributed between them and the plaintiff the amount found due upon this policy, giving to the latter so much of it as would reimburse him for what premiums, or assessments, he has advanced thereon.

It is argued for the appellant company that the plaintiff had no insurable interest in the life of the assured, and that the policy issued by it was therefore void. As nephew of the deceased he certainly had no insurable interest; but he represented in himself other interests. The application for the policy represented him to be a creditor of the applicant upon whose life the insurance was solicited. Whether, if this had been the mere contract of the assured with the company,

the policy, in such case, would have been valid without reference to the insurable interest of the appointee, or payee, in the life assured, presents a question not difficult to answer, upon authority or upon principle. A life insurance policy is not a contract of indemnity. It is a contract to pay a sum of money upon the death of the assured, in consideration of certain payments being duly made at fixed periods during his life. If the insurance is made upon the application of one who has no insurable interest whatever in the life insured, it is a wager policy—that is to say, a speculative contract—which the law condemns. But a person may insure his own life and provide in the contract of insurance that the money shall be payable to any one whom he may appoint, or assign the policy to. What will distinguish the one contract from the other is the fact as to the party actually contracting with the insurer and the distinction is substanial and controlling accordingly. See Rawls v. American Mut. L. Ins. Co., 27 N. Y. 282–287, 84 Am. Dec. 280; Valton v. Nat. Fund L. Assur. Co., 20 N. Y. 32–38; Olmsted v. Keyes, 85 N. Y. 593–598; Dalby v. India, etc., Assurance Co., 15 C. B. 365.

In this case I think we must hold, upon the facts as they have been found, that the insurance was applied for and was effected by the plaintiff; but, also, that he had an insurable interest in the life to be insured. In the first place, it appears that all of the insurance was procured in pursuance of the contract between the plaintiff, the assured, and his children. It was to be maintained by the plaintiff for their benefit and they were to be named as the beneficiaries; but the plaintiff was to be compensated by the repayment from the proceeds of the policies of the amount of his advances of premiums, or assessments, with interest, and by the payment of a substantial sum in addition. This and the other policies, therefore, were based upon the insurable interest of Reed's children, who were represented, and financially assisted, by the plaintiff. By their agreement, he acted for them and he could be held to the performance of the contract, if necessary, as their trustee. In causing the present policy to be issued in his name alone, the fact of the insurable interest was in no wise affected; for the finding is that it was procured in pursuance of the contract.

In the second place, however, the plaintiff personally did have an insurable interest as a creditor of the assured when this policy issued. It is the fact, and it is so found, that at the time he had already advanced and paid the premiums, or assessments, upon the $25,000 of life insurance, taken out some two years previously. To the extent of his payments, he was, under the contract, a creditor of the assured. It did not affect the fact of the personal indebtedness that the plaintiff might be repaid from the proceeds of the insurance. The assured was a debtor for the premiums paid by the plaintiff to maintain the insurance on his life. If there was an insurable interest in

the plaintiff when this policy issued, the legal liability of the company is established, and it is of no consequence that the plaintiff's interest, as a creditor, was less than the amount of the policy.[48] See Olmsted v. Keyes, supra; Wright v. Mutual Ben. Life Association, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749.

The Reed children have been brought into the action (and this upon the express consent of the company), and their rights could be, and they were, adjusted, without prejudice to the company. Wright v. Mutual Ben. Life Association, supra. The policy having been validly issued and the plaintiff having procured it pursuant to the agreement that he should do so for the benefit of the Reed children, the insurer is not in a position to complain that others than the payee named are entitled to some of the insurance moneys. If the Reed children had not been brought into the action, the plaintiff could have collected the insurance moneys, and he, then, would have held their portion as a trustee. On this phase of the case, I find no reason for disturbing the judgment below.

It is contended that the policy lapsed by reason of the nonpayment of certain premiums. The trial court has found that the plaintiff paid all the premiums, or assessments, down to January 12, 1895, about a year before the death of the assured and that the company refused to accept the premium which was due, and which was tendered to it, on that date. It seems that the refusal of the company was upon the ground that the tender of the premium was made too late; but the finding, as to that fact, is that it was duly tendered. It is argued, however, that the subsequent premiums should have been paid, or tendered, and that the failure to do so caused the policy to lapse. The refusal of the company to accept the premium due in January, 1895, was a perfectly good reason for not offering to pay subsequent premiums. If the company's refusal had a legal basis, the contract of insurance was at an end by reason of the violation of the terms of the contract. Its attitude was, and has continued to be, one of repudiation of its obligation to the plaintiff. After its refusal, he was not required to perform the vain and useless act of making further tenders on recurring premium dates. Shaw v. Republic Life Ins. Co., 69 N. Y. 286–293; Hayner v. Am. Popular Life Ins. Co., 69 N. Y. 435–439; Miesell v. Globe Mut. Life Ins. Co., 76 N. Y. 115, 120. Provision was sufficiently made in the judgment for the deduction of unpaid premiums, with interest thereon to the date of the death of the assured, from the amount of the policy. Meyer v. Knickerbocker Life Ins. Co., 73 N. Y. 516, 528, 29 Am. Rep. 200. [The court here determines a question relating to costs.]

I advise that the judgment appealed from should be modified by striking therefrom the award of costs and of an allowance to the de-

[48] Compare decision in Hebdon v. West, 3 Best & S. 579 (1863), reported ante, p. 128, under St. 14 Geo. III, c. 48, § 3.

fendants Reed and Davidson, and that, as so modified, the judgment should be affirmed, without costs in this court to either party as against the other.

CULLEN, C. J., and O'BRIEN, WILLARD BARTLETT, and CHASE, JJ., concur. VANN, J., concurs in result. WERNER, J., absent.

Judgment accordingly.

AMERICAN EMPLOYERS' LIABILITY INS. CO. v. BARR.

(Circuit Court of Appeals of the United States, Eighth Circuit, 1895. 68 Fed. 873, 16 C. C. A. 51.)

In Error to the Circuit Court of the United States for the District of Colorado.

This was an action by William P. Barr against the American Employers' Liability Insurance Company on a policy of insurance. The plaintiff recovered judgment in the circuit court. Defendant brings error. Affirmed.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge.[49] * * * The insured sustained certain injuries on May 20, 1892, by falling from a platform in a building which was in process of construction in the city of Denver, and died four days thereafter, as it is claimed, from injuries resulting from such fall. A suit was brought on the policy by William P. Barr, the defendant in error, to whom, under the aforesaid provisions of the policy, the same was made payable in the event of the death of the assured, and a judgment was recovered against the defendant company for the sum of $5,626.58. * * *

The remaining assignment which we deem it necessary to notice relates to a portion of the charge whereby the court instructed the jury, in substance, that the plaintiff, William P. Barr, had the right to recover on the policy without proof of an insurable interest in the life of his deceased uncle. It will be observed that the policy in suit was taken out by Cousley, that the premium was paid by him, and that the indemnity promised in case of injuries not resulting in death was made payable to Cousley; in other words, the contract was made by Cousley with the insurance company for his own benefit. Barr was named as the person to receive and receipt for the amount due on the policy only in the event that the assured sustained injuries which resulted in his death. Whether Barr was a creditor of his uncle, or whether the deceased intended that Barr should receive and retain the amount paid on the policy as a gratuity, or should collect it as trustee, for the benefit of the assured's wife and children, was not expressly stated in the policy, and was not proven on the trial.

[49] Only that part of the opinion relating to insurable interest is printed.

We are of the opinion, however, that it was not necessary to allege or prove either of these facts. The insurance was obtained by the deceased on his own life, obviously for his own benefit. He had the right to designate the person to whom the indemnity should be paid in case of an injury resulting in death, and having done so, and the company having agreed to pay the indemnity to the person thus designated, it cannot now insist that such person shall prove an insurable interest in the life of the deceased, as a condition precedent to a recovery. The policy sued upon is not a wager contract, but was valid when made, and is still valid, even if it be true that Barr is not a creditor of the deceased. Olmsted v. Keyes, 85 N. Y. 593, and cases there cited.

The record in the case discloses no error, and the judgment of the circuit court is therefore affirmed.[50]

FERGUSON v. MASSACHUSETTS MUT. LIFE INS. CO.

(Supreme Court of New York, 1884. 32 Hun, 306.)[51]

* * * March 23, 1867, Amos S. Ferguson made his note for $6,000 to the order of the plaintiff and John W. Bridenbecker, and they indorsed it for the accommodation of the maker. It was protested at maturity and the plaintiff took it up by paying it to the National Mohawk Valley Bank. The plaintiff became the owner of the note, and held it when the policy was issued in January, 1870, and the plaintiff at that time also held a debt against Amos for

[50] The beneficiary in a policy taken out by the insured need have no interest. Pollock v. Household of Ruth, 150 N. C. 211, 63 S. E. 940 (1909); Albert v. Insurance Co., 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693 (1898); Union Fraternal League v. Walton, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350 (1899).

"Mrs. Downey had an insurable interest in her own life, and had the right, as between herself and the company, when a policy was issued on her application, to name the person to whom the policy should be paid, regardless of insurable interest in her life being possessed by such person. The fact that the premium was paid by the beneficiary does not give to the contract the character of a wagering contract; nor does the fact that the beneficiary has no insurable interest in the life of the assured render the policy void as against public policy. The courts will treat the person named as beneficiary, having no insurable interest, as a trustee appointed to collect the policy for the benefit of those legally entitled, thereby enforcing the contract by which the company has solemnly bound itself, and at the same time conserving public policy by preventing the stranger from gambling on the life of his fellow, or profiting by his death. Insurance Co. v. Williams, 79 Tex. 633 [15 S. W. 478 (1891)]; Insurance Co. v. Hazlewood, 75 Tex. 351 [12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893 (1889)]; Insurance Co. v. Baum, 29 Ind. 236 [1867]; Langdon v. Insurance Co. [C. C.] 14 Fed. 272 [1882]; Curtiss v. Ins. Co. [90 Cal. 245] 27 Pac. [211, 25 Am. St. Rep. 114 (1894)]; Mayher v. Insurance Co., decided by this court at present term [87 Tex. 169, 27 S. W. 124 (1894)]." Mutual Life Ins. Co. v. Blodgett, 8 Tex. Civ. App. 45, 43, 27 S. W. 286, 287 (1894).

[51] The statement of facts is abbreviated.

$419.37. March 27, 1868, the plaintiff and Bridenbecker recovered a judgment for $6,464.64 against Amos S. Ferguson on the indebtedness of $6,000, as aforesaid. Amos S. Ferguson died on the 15th of May, 1877.

In the application for the policy, which was made and dated January 27, 1870, the plaintiff declared that he had an interest in the life of Amos S. Ferguson, "to the full amount of the said sum of five thousand dollars." The annual premium was $206.50, and the plaintiff produced receipts therefor up to the time of the death, which premiums were paid by him. The court held that if the plaintiff had "an insurable interest at the issuing of the policy, that is sufficient." The defendant excepted. The defendant offered to show "that at the time of the death the plaintiff had no insurable interest." The offer was objected to and excluded, and the defendant excepted. The defendant offered in evidence the discharge of Amos S. Ferguson in bankruptcy, dated the 28th day of April, 1868; this was objected to as immaterial, and on the ground that the discharge was not pleaded. The court sustained the objections, and the defendant excepted.

At the close of the evidence the defendant moved for a nonsuit upon the grounds, First. There was breach of warranty as to the health of Amos S. Ferguson. Second. That plaintiff had no insurable interest in the life of Amos S. Ferguson, "either at the time the policy was issued, or at the time of his death;" it also offered to return the premiums. The motion was denied and the defendant excepted.

The court then ruled and decided that under the policy the plaintiff must have had an insurable interest of $5,000 when the policy was issued, and that the jury must so find; if his insurable interest was less than that sum, the policy would be vitiated. The case was submitted to the jury.

Hardin, J. [after deciding that the verdict of the jury to the effect that at the time the policy was taken out plaintiff had an insurable interest in the life of his debtor, Amos Ferguson, was not to be disturbed]. Second. We now come to the questions made at the trial, as to the effect of a partial payment of the indebtedness in the lifetime of Amos, to the effect of his discharge in bankruptcy, and to the effect of an actual payment of the indebtedness in the lifetime of Amos, and to the position of defendant that the plaintiff cannot recover if he did not at the time of the death of Amos have an insurable interest in the life of Amos. It is insisted in behalf of the defendant that on a former appeal (22 Hun, 325) the latter branch of the position was determined by the court in favor of the position of defendant. We do not think so; though it must be admitted that such a dictum appears in the opinion of Presiding Justice Talcott, who spoke for the court on that occasion. The cases

referred to by him in connection with that dictum do not bear out the expression. He referred to Shotwell v. Jefferson Insurance Company, 5 Bosw. 247; Murdock v. Chenango Insurance Company, 2 N. Y. 210; Fowler v. New York Insurance Company, 26 N. Y. 422; Freeman v. Fulton Fire Insurance Company, 14 Abb. Prac. 398; Mutual Life Insurance Company v. Wager, 27 Barb. 359.

They were cases relating to fire insurance policies, and do not at all support the dictum as applied to this case. That the question now here was not decided by the court in the former appeal, appears by a careful examination of the presiding justice's opinion. Towards the close of it he says, viz.: "We think the verdict was erroneously directed for the reason that the judgment in the former action was received as an absolute bar, and an estoppel against the defendant's defense, not only of a want of interest in the plaintiff in the life insured by the policy, but also as a bar to the defense of a breach of warranty."

"But in so holding we do not mean to be understood as deciding but what the subsequent payment and receipt of the premiums, with notice to the company of the facts which are set up as breaches of the warranties, may have estopped it from setting up those defenses; but only that the verdict was directed on erroneous grounds, and because there may be questions of fact as well as law to be disposed of on another trial."

We are at liberty to consider as open for decision in this court, the questions which we have alluded to, relating to the question of plaintiff's interest in the life of Amos, when the death occurred. In considering this question it must be borne in mind that the premiums were all paid by the plaintiff with his own money, and that he was in no sense acting for Amos in such payments. He had no right to charge them to Amos, nor did he attempt to do so. Plaintiff's application for the policy was independent of Amos. It was bargained for by plaintiff, without any agreement whatever with Amos in regard to it. It is inferable that the plaintiff paid in premiums just as much as the defendant would have charged Amos for a policy on his own life. In either case it is the usual practice of insurance companies to fix the amount of premium to be exacted, in reliance upon tables made up by considering the probabilities of the duration of the life upon which the policy runs. Besides, the stipulations of the policy have no reference to the creditor's claim upon the debtor. The policy is not in terms made collateral to the creditor's debt, as is the case in respect to fire insurance policies. But it contains as absolute contract to pay a stated sum upon the happening of a specified event, namely, the close of the life named in the policy.

There being a debt at the time the policy is issued, it is then valid. It contains no condition referring to the continuance of the indebtedness. But, on the contrary, the policy evidences a flat and posi-

tive promise to pay a given sum at the termination of the life named. Death removes the last condition precedent except, perhaps, the delivery of proofs of the death. Then the holder becomes entitled to demand the sum named in the promise. Of course, in fire policies, the nature of the promise is different. That is a contract of indemnity against loss. The nature and extent of the loss must be shown, and only to the making good of the loss is the insurer bound in the very terms of his contract. No statute has gone so far as to declare that a life policy, valid in its inception because of a creditor's interest in the life of his debtor, shall be invalid the moment the debt is paid. Goodwin v. Mass. Life Ins. Co., 73 N. Y. 497. Besides, from the nature of the contract, which is paid for by the creditor, he needs the payment of the policy to do complete justice to him. Suppose he has received, subsequent to payment of premiums for years, the debt due from his debtor, he has thus received only what it may be assumed he has advanced or loaned to his debtor. He has received nothing for the series of premiums he has delivered over from year to year to the insurer to keep alive the policy.

So, too, in the case at hand, if we were to hold that the policy was avoided by payment or discharge in bankruptcy of the debt, the creditor would surely be the loser of the premiums paid, after the payment of his debt or the discharge in bankruptcy, and the insurance company would be the gainer. It would keep in its coffers moneys which it received as a consideration for its promise, which it had not kept. It would be the gainer by the incidental circumstance that the debtor had paid what only he justly owed his creditor, or what he had escaped paying by obtaining a discharge in bankruptcy. Surely no such contingency was taken into mind or measured in fixing the amount of premiums demanded for the policy. That amount was ascertained by the standard tables relating to the probabilities of human life upon which life insurance companies anchor when they fix and determine the schedule of premiums to be exacted in the conduct of their business. We are, upon principle, prepared to agree with the English Court in its conclusion in Dalby v. India and London Life Assurance Company, 28 Eng. Law and Eq. 312. Indeed we think the doctrine of that case has been accepted in this state, and that both upon principle and authority we should say that the insurer is bound to fulfill its contract, valid in its inception, notwithstanding the debtor upon whose life it runs may have paid his creditor or obtained a discharge in bankruptcy therefrom. Rawls v. American Life Insurance Co., 36 Barb. 357, affirmed 27 N. Y. 282, 84 Am. Dec. 280; St. John v. American Mut. Life Ins. Co., 13 N. Y. 31, and note at page 41, 64 Am Dec. 529; Olmsted v. Keyes, 85 N. Y. 593, 599; Bliss, Life Ins., § 30; May, Ins., §§ 115, 116.

The discharge in bankruptcy did not destroy the moral obligation of the debtor to pay his debt. Dusenbury v. Hoyt, 53 N. Y. 521, 13

Am. Rep. 543. Besides, it appears that no such defense as a discharge in bankruptcy was interposed in the action brought upon the debt, or set up in a supplemental answer, and judgment passed against the debtor and remained unquestioned when the policy matured. The discharge in bankruptcy at most was a personal defense, which by not pleading or asserting by motion for a perpetual stay the debtor could waive. The discharge when granted operates to cut off the creditor's remedy for the enforcement of his debt by judgment and execution as fully as the statute of limitations. And the nature of either of the two defenses does not suggest any distinction between them, so far as they may affect the question of an insurable interest in a creditor, after the right to interpose such a defense has arisen in favor of the debtor. In Rawls v. American Life Insurance Company, 27 N. Y. 282, 84 Am. Dec. 280, it was held that a creditor's insurable interest continues, although the statute of limitations would have barred his action on the debt if pleaded before the debtor's death. See, also, Olmsted v. Keyes, 85 N. Y. 598. We have not overlooked the fact that a discharge in bankruptcy might have been used upon a motion for a perpetual stay of the judgment by the debtor. Cornell v. Dalken, 38 N. Y. 253. But it appears the debtor made no such use of it, though he continued in life nearly ten years after the recovery of a judgment against him upon the debt existing at the time the policy was issued.

After the recovery of the judgment, March 27, 1868, the discharge granted April, 1868, was not asserted by the debtor upon any motion for a perpetual stay of execution or otherwise. We see no sound reason why the defendant should now avail of or profit by the discharge. Defendant urges that in a case where the debt has been paid a payment by the insurance company of the policy would be a payment of the debt a "second time." Not at all. The company simply observes its contract to pay a stated sum of money in return for premiums received, as soon as the death happens, which is the only event named in its contract which must occur before its promise becomes absolute.

The case of Babcock v. Bonnell, 10 Weekly Dig. 158; s. c., 80 N. Y. 244, cited by appellant's counsel, is unlike the one before us. There it was found as a fact that the policy was taken out and delivered to defendant as collateral security for an indebtedness of the firm, and it was held that when that indebtedness was discharged the defendant had no further right to the policy. The deceased debtor obtained the policy, paid the first premium, and delivered it as collateral to certain debts, and they were paid in part and compromised, and the court found defendant had no other interest in the policy and was bound to account for it. The case is not like the one before us. Ruse v. Mutual Benefit Life Insurance Company, 23 N. Y. 523, and s c., 24 N. Y. 653, on motion for a reargument, does not aid the appellant. That case declares that at the

time the policy is issued, the party obtaining it must have an insurable interest, and that in the absence of proof, that fact is fatal to a recovery. Judge Selden's opinion shows that without such interest the policy would be a wager one, and void at common law, as well as by the statute of 14 George III.

We pass from this branch of the case, having reached the conclusion that the partial payment of the debt, a discharge in bankruptcy, a full payment of the debt, if made out by the evidence, would not have constituted a defense to plaintiff's claim upon the policy, or to any part thereof.[52] * * *

Judgment and order affirmed.[53]

CHICAGO TITLE & TRUST CO. v. HAXTUN.

(Appellate Court of Illinois, First District, 1906. 129 Ill. App. 626.)

Statement by the Court. This is an appeal from a decree of the Superior Court in an interpleader case.

The Mutual Life Insurance Company of New York filed its bill of interpleader, alleging that on May 25, 1879, it issued its policy of insurance numbered 202,636 for $2,850 upon the life of one Edward Brundige, Jr., payable to William E. Haxtun, beneficiary; that said Edward Brundige, Jr., died January 28, 1901, and that William E. Haxtun died June 14, 1900; that the Chicago Title & Trust Company of Chicago, as administrator of the estate of said Edward Brundige, Jr., demanded the amount due on said policy, and that Sarah A. Haxtun also claimed the amount due on said policy as assignee thereof, and as the sole legatee and devisee of said William E. Haxtun, the beneficiary named in said policy; that said company was ready to bring the amount due on said policy into court and pay the same as the court should direct.

After answers of the defendants and replications thereto by the complainant were filed, an interlocutory decree was entered by the court, ordering and directing the complainant company to pay $3,135, the amount due on the policy, into court, and referring the cause to a master in chancery to take proofs and report his conclusions.

The master heard the evidence and reported it, together with his conclusions, to the court. The master found that the defendant, Sarah A. Haxtun, was entitled to the fund, and recommended a decree directing the clerk to pay the money to her.

Objections were filed by appellant, which were overruled by the master. Appellant filed exceptions to the report, which were overruled, by the court, and a decree was entered in accordance with the master's report.

[52] The remainder of the opinion, not relating to insurable interest, is omitted.

[53] Affirmed in 102 N. Y. 647 (1886).

SMITH, J. The question presented for decision is: Which of the defendants is entitled to the fund?

It is contended on behalf of appellant that appellee was bound to allege and prove an insurable interest in the life of Brundige at the time the policy was issued, and that such interest was not shown by the proofs. The argument is that one who takes out a policy on the life of another, and pays the premiums himself, must have an insurable interest in the life of that other or the policy will be a mere wager, upon which the party to whom it is issued cannot recover; and that there can be no such thing as a lawful beneficiary unless he have an insurable interest. Therefore this must be alleged and proved.

While it may be conceded that the general rule of law is that insurance taken out on the life of another, in whose life the person procuring the insurance had at the time no interest, is invalid, it is also the law that no one but the insurer can raise the question. In Johnson et al. v. Van Epps, 110 Ill. 551, it is said, at page 563, in the opinion on an application for a rehearing, in response to the suggestion here made: "Conceding, for the purposes of the argument, that it is so, and that the decree for this reason is erroneous, it does not necessarily follow the decree should be reversed at the instance of appellants, for that reason. The argument is like a two-edged sword—it cuts both ways. It proves too much. As it has been fully shown, the alleged rights which appellants are seeking to enforce in this proceeding are based upon this very certificate, and if it is true, as claimed by them, the certificate is void as against public policy, it manifestly follows they themselves acquire no rights under it for no one can acquire rights under a void instrument, and, it is hardly necessary to add, one will not be heard to complain of an error that does not injuriously affect some right of his. Assuming appellants' hypothesis to be true, the company or society alone would have the right to complain. But it is entirely content, and makes no objection whatever to the payment of the money on the ground suggested."

So here, the insurance company concedes its liability on the policy, and has brought the money into court, and the interlocutory decree entered at its instance has had the policy declared to be valid and in full force and effect. The objection urged cannot be made by appellant, for if it is a good objection, appellant is out of court.

The record, however, does not bear out the assertion that appellee made no proof of an insurable interest in the life of Brundige.

Appellee, to sustain her claim to the fund paid into court, offered in evidence before the master a promissory note dated May 23, 1866, signed Edward Brundige, Jr., payable on demand to William E. Haxtun, for $1,084, with interest from date. At the time the policy was issued William E. Haxtun was a creditor of Brundige, as shown by this note. True, the Statute of Limitations had run against the note at the death of Brundige, but that did not affect the debt. Rawls v.

Am. Life Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280; Conn. Mutual Life Ins. Co. v. Dunscomb, 108 Tenn. 724, 69 S. W. 345, 58 L. R. A. 694, 91 Am. St. Rep. 769.

In 1 May on Insurance, § 108, the author says: "Upon the same principles, if the debt be one to which the Statute of Limitations might be pleaded at the time of the death of the debtor, it nevertheless constitutes an interest which will support a policy. A debt still exists. It is not extinguished by the currency of the statute, as in case of payment."

The note offered in evidence was thirty-eight years old, and the payment of the debt evidenced by it may be presumed. "But this is a rebuttable presumption, and may be overcome by any evidence tending to satisfy the court that the debt is still due. The condition of the debtor as to solvency or other circumstances may repel the presumption." Conn. Mutual Life Ins. Co. v. Dunscomb, supra, and cases there cited.

We think the evidence before the master was sufficient to rebut the presumption of the payment of the indebtedness, on and prior to the assignment of the policy to appellee.

The assignment of the policy for value received to Sarah A. Haxtun on December 26, 1892, appears to be in due and regular form. This assignment was properly admitted in evidence under the averments of the answer of appellee, thus completing appellee's title and right to recover the fund.

Finding no error in the decree of the court below, it is affirmed.

Affirmed.

In re POLICY NO. 6402 OF SCOTTISH EQUITABLE LIFE ASSUR. SOCIETY.

(Supreme Court of Judicature, Chancery Division, 1902. 1 Ch. 282.)

On March 11, 1850, Mr. William Sanderson effected a policy on his own life for £400. with the Scottish Equitable Life Assurance Society "for behoof of Miss Harriott Stiles," and it was thereby certified that the said Harriott Stiles, and her executors, administrators, and assigns, should be entitled to receive at the end of six months after the decease of the said William Sanderson the sum of £400., or such other sum as should become payable upon the contingency before expressed, agreeably to the laws and regulations of the said society; and it was thereby specifically declared and agreed that the sum or sums to become due and payable as therein mentioned should be payable to the executors, administrators, or assigns of the said assured at the office of the society in London, and that the receipt of the person or persons who in the character of executor or executors, or administrator or administrators, would by the law of England have been competent to have given a discharge for the said sum

or sums, if the said policy had been a policy issued by a society or company established in England, should be a valid or sufficient discharge to the society for the said sum or sums, notwithstanding that the said policy was a policy issued by a society established in Scotland.

Mr. Sanderson's wife died in the same year, 1850, and in May, 1852, Mr. Sanderson went through the ceremony of marriage with Miss Stiles, who was his deceased wife's sister.

Miss Stiles died on September 21, 1870, and Mr. Sanderson on September 22, 1900.

There was then due under the policy the sum of £790. 17s. 4d. Doubts having arisen as to who was entitled to this sum, the insurance company paid the money into court under the Life Assurance Companies (Payment into Court) Act, 1896.

This summons was taken out by the executors of Mr. Sanderson for the determination of the question whether the money belonged to them, or to the legal personal representative of Miss Stiles.

It appeared that Mr. Sanderson had always retained the policy in his own possession, and had regularly paid the premiums thereon until his death. There was no evidence to shew that the policy was taken out for the benefit of Miss Stiles.

Joyce, J. In the leading case of Dyer v. Dyer (1788) 2 Cox, 92, 93, 1 Watk. Copy. 216, 2 R. R. 14, Eyre, C. B., in giving his judgment, says: "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name of several; whether jointly or successive, results to the man who advanced the purchase-money"; and, although the judgment goes only to real estate or to leaseholds, I think the law is correctly laid down in Lewin on Trusts, 10th ed. p. 175, where it is stated: "Not only real estate, but personalty also, is governed by these principles, as if a man take a bond, or purchase an annuity, stock, or other chattel interest, in the name of a stranger, the equitable ownership results to the person from whom the consideration moved."

The authority cited with reference to a bond is the case of Ebrand v. Dancer (1680) 2 Ch. Cas. 26, where a grandfather had taken a bond in the name of his grandchildren, their father being dead. The Lord Chancellor said: "There is difference in the case, where the father is dead and where he is alive; for when the father is dead, the grandchildren are in the immediate care of the grandfather; and if he take bonds in their names, or make leases to them it shall not be judged trusts, but provision for the grandchild, unless it be otherwise declared at the same time." In other words, that means that, if the grandfather in that case had not been in loco parentis to the grandchildren in whose name the bond had been taken out, then they would have been trustees for the grandfather, who took the bond.

Then there is the case of Rider v. Kidder, 10 Ves. 360, 53 R. R. 269. There John Rider purchased Consolidated 2 per cent. Annuities, and retransferred the stock into the joint names of himself and the defendant Anne Kidder; and Sir Samuel Romilly, in his argument in that case, cites Mortimer v. Davies, and says (10 Ves. 363): "In Mortimer v. Davies, a late case at the Rolls, a man living in this way, but not married, purchased an annuity in the name of the woman with whom he cohabited. It appeared that the purchase-money was his; and no consideration passed from her. She insisted, that it was intended as a provision for her; but was held to be a trustee." That case is again mentioned by Sir Samuel Romilly in his reply. He says (Ibid. 365): "In Mortimer v. Davies, there were no circumstances. Upon the dry point alone, that the defendant cannot produce evidence of an intention to make a provision for her, this plaintiff is entitled"; and it appears that in this particular case of Rider v. Kidder, 10 Ves 360, (1806) 12 Ves. 202, 53 R. R. 269, the annuities were directed to be retransferred. Lord Eldon says (10 Ves. 366): "If the case at the Rolls was purely this, that A. bought an annuity in the name of B., A. paying for it, and B. had no proof, that it was meant as a provision for her, in this Court the fact of the advancement of the purchase-money, as between these persons, standing in no relation to each other, that would meet the presumption, raises a trust in the person, vested with the interest, for the benefit of the person, who paid the money;" and later on he says: "If therefore this case depended upon the mere naked circumstances of the purchase of stock in both their names, and he had died immediately, without any dealing or transaction upon it, I should have thought, the defendant would have been a trustee for his personal representative; as she would have been for himself." And Lord Romilly puts it quite generally in the case of Garrick v. Taylor (1860) 29 Beav. 79, 83, which was affirmed in the Court of Appeal, (1861) 31 L. J. (Ch.) 68. He says.: "If a purchase be made by one in the name of another, the presumption is that the latter is a trustee for the person who pays the money, unless the parties stand in the relation of parent and child."

Now, in the present case a policy was taken out by Mr. Sanderson a great many years ago, and the name of Miss Stiles appears in the policy as the person to whom the money is to be paid. The policy was never handed to her, and she is now dead, and the premiums were always paid, and were paid for many years after her death, by Sanderson. That, really, is a case of a man taking the policy out in the name of another, that other person being a sister of his wife, and, therefore, not standing in any relation to him "that would meet the presumption," as Lord Eldon expressed it. It comes really to this: A purchase by one in the name of another with no other circumstances at all proved. Therefore, in my opinion, although the legal personal representative of the lady in this case would be the person

entitled to receive the money at law and to give a receipt for it, in equity the money belongs to the legal personal representatives of Mr. Sanderson, who took out the policy.

WARNOCK v. DAVIS.

(Supreme Court of the United States, 1881. 104 U. S. 775, 26 L. Ed. 924.)

Error to the Circuit Court of the United States for the Southern District of Ohio.

Warnock, the plaintiff, is the administrator of the estate of Henry L. Crosser, deceased, and a resident of Kentucky. Davis and the other defendants are partners, under the name of the Scioto Trust Association, of Portsmouth, Ohio, and reside in that state. On the 27th of February, 1872, Crosser applied to the Protection Life Insurance Company, of Chicago, a corporation created under the laws of Illinois, for a policy on his life to the amount of $5,000; and, on the same day, entered into a written contract [54] with the Scioto Trust Association whereby he agreed that he would assign the policy applied for to the association as soon as it was issued, while the association agreed to pay the first and all subsequent premiums and other charges that might become due on such policy and furthermore, at the death of Crosser, to pay over one-tenth of the proceeds of the policy to such person as might be entitled thereto by the terms of the assignment.

The policy, bearing even date with the agreement, was issued to Crosser, and on the following day he executed to the association an assignment in accordance with the provisions of the agreement.

Crosser died on the 11th of September, 1873, and on the 16th of May, 1874, the association collected from the company the amount of the policy, namely, $5,000; one-tenth of which, $500, less certain sums due under the agreement, was paid to the widow of the deceased.

The present action is brought to recover the balance, which with interest exceeds $5,000. The defendants admit the collection of the money from the insurance company; but, to defeat the action, rely upon the agreement mentioned, and the assignment of the policy stipulated in it. The agreement and assignment are specifically mentioned in the second and third of the three defences set up in their answer. The first defence consists in a general allegation that Crosser assigned, in good faith and for a valuable consideration, nine tenths of the policy to the defend-

[54] This contract, as well as the subsequent assignment, is set out in full in the original report.

ants; that a power of attorney was at the time executed to them to collect the remaining one tenth and pay the same over to his widow; and that after the collection of the amount they had paid the one tenth to her and taken her receipt for it.

The case was tried by the court without the intervention of a jury. On the trial, the plaintiff gave in evidence the deposition of the receiver of the insurance company, who produced from the papers in his custody the policy of insurance, the agreement and assignment mentioned, the proofs presented to the company of the death of the insured, and the receipt by the association of the insurance money. There was no other testimony offered. The court thereupon found for the defendants, to which finding the plaintiff excepted. Judgment being entered thereon in their favor, the case is brought to this court for review.

Mr. Justice FIELD, after stating the facts, delivered the opinion of the court, as follows:

As seen from the statement of the case, the evidence before the court was not conflicting, and it was only necessary to meet the general allegations of the first defence. All the facts established by it are admitted in the other defences. The court could not have ruled in favor of the defendants without holding that the agreement between the deceased and the Scioto Trust Association was valid, and that the assignment transferred to it the right to nine-tenths of the money collected on the policy. For alleged error in these particulars the plaintiff asks a reversal of the judgment.

The policy executed on the life of the deceased was a valid contract, and as such was assignable by the assured to the association as security for any sums lent to him, or advanced for the premiums and assessments upon it. But it was not assignable to the association for any other purpose. The association had no insurable interest in the life of the deceased, and could not have taken out a policy in its own name. Such a policy would constitute what is termed a wager policy, or a mere speculative contract upon the life of the assured, with a direct interest in its early termination.

It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the

life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy.

The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded, if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money. * * *[55]

Although the agreement between the Trust Association and the assured was invalid as far as it provided for an absolute transfer of nine tenths of the proceeds of the policy upon the conditions named, it was not of that fraudulent kind with respect to which the courts regard the parties as alike culpable and refuse to interfere with the results of their action. No fraud or deception upon any one was designed by the agreement, nor did its execution involve any moral turpitude. It is one which must be treated as creating no legal right to the proceeds of the policy beyond the sums advanced upon its security; and the courts will, therefore, hold the recipient of the moneys beyond those sums to account to the representatives of the deceased. It was lawful for the association to advance to the assured the sums payable to the insurance company on the policy as they became due. It was, also, lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund those sums, with interest. To hold it valid for the whole proceeds would be to sanction speculative risks

[55] The court's discussion of Franklin Life Ins. Co. v. Hazzard, 41 Ind. 116, 13 Am. Rep. 313 (1872), is here omitted.

on human life, and encourage the evils for which wager policies are condemned.

The decisions of the New York Court of Appeals are, we are aware, opposed to this view. They hold that a valid policy of insurance effected by a person upon his own life, is assignable like an ordinary chose in action, and that the assignee is entitled, upon the death of the assured, to the full sum payable without regard to the consideration given by him for the assignment, or to his possession of any insurable interest in the life of the assured. St. John v. Insurance Co., 13 N. Y. 31, 64 Am. Dec. 529; Valton v. Assurance Co., 20 N. Y. 32. In the opinion in the first case the court cite Ashley v. Ashley, 3 Simons, 149, in support of its conclusions; and it must be admitted that they are sustained by many other adjudications. But if there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other—so far, at least, as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life.

In this conclusion we are supported by the decision in Cammack v. Lewis, 15 Wall. 643, 21 L. Ed. 244. There a policy of life insurance for $3,000, procured by a debtor at the suggestion of a creditor to whom he owed $70, was assigned to the latter to secure the debt, upon his promise to pay the premiums, and, in case of the death of the assured, one third of the proceeds to his widow. On the death of the assured, the assignee collected the money from the insurance company and paid to the widow $950 as her proportion after deducting certain payments made. The widow, as administratrix of the deceased's estate, subsequently sued for the balance of the money collected, and recovered judgment. The case being brought to this court, it was held that the transaction, so far as the creditor was concerned, for the excess beyond the debt owing to him, was a wagering policy, and that the creditor, in equity and good conscience, should hold it only as security for what the debtor owed him when it was assigned, and for such advances as he might have afterwards made on account of it; and that the assignment was valid only to that extent. This decision is in harmony with the views expressed in this opinion.

The judgment of the court below will, therefore, be reversed, and the cause remanded with direction to enter a judgment for

the plaintiff for the amount collected from the insurance company, with interest, after deducting the sum already paid to the widow, and the several sums advanced by the defendants; and it is so ordered.[56]

LAKE v. NEW YORK LIFE INS. CO.

(Supreme Court of Louisiana, 1908. 120 La. 971, 45 South. 959.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Action by Mayme Lake against the New York Life Insurance Company and Jacob C. Simon. From the judgment, Simon appeals. Reversed and rendered.

PROVOSTY, J. The defendant insurance company has deposited in court the proceeds of four insurance policies on the life of Elias Lake, to be litigated over by the plaintiff, Mrs. Mayme Lake, surviving widow of Elias Lake and administratrix of his succession, and Jacob C. Simon, the real defendant in the case, who was the assignee of the policies.

Plaintiff contends that the policies were assigned to Simon merely in pledge, and that the debt secured by the pledge was not as large as is pretended by Simon; and, in alternative, plaintiff contends that, if the assignment was an absolute transfer, it was null except to the extent that Simon was the creditor of her husband, and as such had an insurable interest in his life.

We experience no difficulty in finding, with the learned trial judge, that the assignment was intended to be absolute, and that the debt was as large as claimed by Simon. Lake and Simon were fellow clerks in the employ of Simon's brother-in-law. Lake had a family to support, and had no means outside of his salary of $75 to $100 a month. Simon was a bachelor, living rent and board free at his sister's, and receiving an income of $300 a month from his

[56] "We agree with the learned judge of the court below that the affidavit of defense was insufficient. The policy of insurance in question was taken out on the life of Margaret Brennan. The insurance company defends upon the ground that the policy was issued and delivered to Catharine Lamb, who took it, and paid all the premiums on it which were paid, as beneficiary; and that the said Catharine Lamb had no insurable interest in the life of Margaret Brennan, being neither a creditor nor a relation. There would have been more force in this defense if the suit had been brought by Catharine Lamb. It was brought, however, by the administrator of the estate of Margaret Brennan, and we have been furnished with no sufficient reason why he may not recover." Brennan v. Prudential Ins. Co. of America, 148 Pa. 199, 23 Atl. 901 (1892).

Compare Bromley v. Washington Life Ins. Co., 122 Ky. 402, 92 S. W. 17, 28 Ky. L. Rep. 1300, 5 L. R. A. (N. S.) 747, 121 Am. St. Rep. 467, 12 Ann. Cas. 685 (1906), and Trinity College v. Travelers' Ins. Co., 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291 (1893), in which policies issued under circumstances similar to those in the principal case were wholly void.

salary and an investment of $20,000. The two were friends. Simon had at divers times made small loans to Lake, which, with capitalized interest, had grown at the time of the assignment to $2,834.20. The assignment came about in the following manner. Lake sought to borrow $1,000 more of Simon, and in applying for the loan informed him that his intention was to insure his life in favor of his wife for $1,000, and to take out at the same time $10,000, additional, and assign the latter to him in payment of the debt already due and of the additional loan applied for. This plan was carried out. Four policies of $2,500 each were taken out by Lake in the defendant company on his own life payable to his executors, administrators, and assigns, and a few days after their issuance were assigned over in full ownership to Simon, and Simon surrendered to Lake all the notes and duebills he held representing the old debt and representing $250, which he had in the meantime let him have out of the $1,000, and paid him the balance of the $1,000. Simon was to pay all the premiums, including the first.

Simon was not related to Lake by blood or marriage, and had no other insurable interest in his life than as creditor.

The law seems to be fairly settled that a life insurance policy is an incorporeal right, or chose in action, which may be sold, or given in payment of a debt; and that the transaction is not the less valid where the transferee is to pay all future premiums; not, at least, where the value of the policy, and the price of the sale, or amount of the debt, are not so disproportionate as to show that the transaction was nothing more than a mere wagering scheme. 25 Cyc. 709; Metropolitan Life Ins. Co. v. Elison, 72 Kan. 199, 83 Pac. 410, 3 L. R. A. (N. S.) 934, 115 Am. St. Rep. 189, 7 Ann. Cas. 909; Rylander v. Allen, 125 Ga. 206, 53 S. E. 1032, 6 L. R. A. (N. S.) 128, 5 Ann. Cas. 355; Alba v. Providence Life Assurance Society, 118 La. 1021, 43 South. 663.

Whether it makes any difference that the policy is taken out, as in this case, in pursuance of an agreement that it is to be transferred, and that the transferee is to pay the premiums from first to last, is really the only question in the case. We see no good reason why it should. Whether the policy be first taken out and then sold, or given in payment, or be taken out in pursuance of an agreement that such a use is to be made of it, the wagering element, which is the objectionable feature of such a transaction, is equally present. The taking out of life insurance with a view to its being used as collateral security is a common practice; now, if such insurance may be taken out for the purpose of being pledged, why not for the purpose of being given in payment? The insurable interest which supports the transaction in the one case is equally present in the other.

Doubtless such a transaction lends itself more readily to fraud, and for that reason may have to be scrutinized more closely by

the courts; but that is an objection which addresses itself to the facts and not to the law—to the transaction in the concrete, not in the abstract. In the case at bar, the transaction was characterized by the most perfect good faith. Lake was 33 years old and his expectancy of life was 33 years and some months. Had he lived out his full quota, the yearly premium of $281, would, with interest, have exceeded the $10,000, so that Simon would have paid out in premiums more than the amount of the policy, and would in addition have lost his large debt and his $1,000 loan. By the transaction, Lake paid his heavy debt and got $1,000 additional. At Lake's death, six years and four months after the issuance of the policies, Simon had already paid $2,254.40 in premiums.

It is ordered, adjudged, and decreed that the judgment appealed from be set aside, and that the defendant, Jacob C. Simon, have judgment decreeing him to be entitled to receive the fund deposited in court by the defendant company, and ordering said money to be paid over to him; and that plaintiff pay the costs of this suit.

BREAUX, C. J., dissents.

GRIGSBY v. RUSSELL.

(Supreme Court of the United States, 1911. 222 U. S. 149, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. [N. S.] 642.)

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which, reversing a judgment of the Circuit Court for the Middle District of Tennessee, held an assignment of a policy of life insurance to an assignee with no insurable interest valid only to the extent of the money actually given for it and the premiums subsequently paid. Reversed.

See same case below, 94 C. C. A. 61, 168 Fed. 577.

Mr. Justice HOLMES delivered the opinion of the court:

This is a bill of interpleader brought by an insurance company to determine whether a policy of insurance issued to John C. Burchard, now deceased, upon his life, shall be paid to his administrators or to an assignee, the company having turned the amount into court. The material facts are that after he had paid two premiums and a third was overdue, Burchard, being in want and needing money for a surgical operation, asked Dr. Grigsby to buy the policy, and sold it to him in consideration of $100 and Grigsby's undertaking to pay the premiums due or to become due; and that Grigsby had no interest in the life of the assured. The circuit court of appeals, in deference to some intimations of this court, held the assignment valid only to the extent of the money actually given for it and the premiums subsequently paid. 94 C. C. A. 61, 168 Fed. 577.

Of course, the ground suggested for denying the validity of an assignment to a person having no interest in the life insured is the pub-

lic policy that refuses to allow insurance to be taken out by such persons in the first place. A contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end. And although that counter interest always exists, as early was emphasized for England in the famous case of Wainewright (Janus Weathercock), the chance that in some cases it may prove a sufficient motive for crime is greatly enhanced if the whole world of the unscrupulous are free to bet on what life they choose. The very meaning of an insurable interest is an interest in having the life continue, and so one that is opposed to crime. And what, perhaps, is more important, the existence of such an interest makes a roughly selected class of persons who, by their general relations with the person whose life is insured, are less likely than criminals at large to attempt to compass his death.

But when the question arises upon an assignment, it is assumed that the objection to the insurance as a wager is out of the case. In the present instance the policy was perfectly good. There was a faint suggestion in argument that it had become void by the failure of Burchard to pay the third premium ad diem, and that when Grisby paid, he was making a new contract. But a condition in a policy that it shall be void if premiums are not paid when due means only that it shall be voidable at the option of the company. Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689; Oakes v. Manufacturers' F. & M. Ins. Co., 135 Mass. 248. The company waived the breach, if there was one, and the original contract with Burchard remained on foot. No question as to the character of that contract is before us. It has been performed and the money is in court. But this being so, not only does the objection to wagers disappear, but also the principle of public policy referred to, at least, in its most convincing form. The danger that might arise from a general license to all to insure whom they like does not exist. Obviously it is a very different thing from granting such a general license, to allow the holder of a valid insurance upon his own life to transfer it to one whom he, the party most concerned, is not afraid to trust. The law has no universal cynic fear of the temptation opened by a pecuniary benefit accruing upon a death. It shows no prejudice against remainders after life estates, even by the rule in Shelley's Case. Indeed, the ground of the objection to life insurance without interest in the earlier English cases was not the temptation to murder, but the fact that such wagers came to be regarded as a mischievous kind of gaming. Stat. 14 George III., chap. 48.

On the other hand, life insurance has become in our days one of the best recognized forms of investment and self-compelled saving. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property. This is recognized by

the bankruptcy law, § 70 (U. S. Comp. St. 1901, p. 3451), which provides that unless the cash surrender value of a policy like the one before us is secured to the trustee within thirty days after it has been stated, the policy shall pass to the trustee as assets. Of course the trustee may have no interest in the bankrupt's life. To deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owner's hands. The collateral difficulty that arose from regarding life insurance as a contract of indemnity only (Godsall v. Boldero, 9 East, 72), long has disappeared (Phœnix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501). And cases in which a person having an interest lends himself to one without any, as a cloak to what is, in its inception, a wager, have no similarity to those where an honest contract is sold in good faith.

Coming to the authorities in this court, it is true that there are intimations in favor of the result come to by the circuit court of appeals. But the case in which the strongest of them occur was one of the type just referred to, the policy having been taken out for the purpose of allowing a stranger association to pay the premiums and receive the greater part of the benefit, and having been assigned to it at once. Warnock v. Davis, 104 U. S. 775, 26 L. Ed. 924. On the other hand, it has been decided that a valid policy is not avoided by the cessation of the insurable interest, even as against the insurer, unless so provided by the policy itself. Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251. And expressions more or less in favor of the doctrine that we adopt are to be found also in Ætna L. Ins. Co. v. France, 94 U. S. 561, 24 L. Ed. 287; Mutual L. Ins. Co. v. Armstrong, 117 U. S. 591, 29 L. Ed. 997, 6 Sup. Ct. 877. It is enough to say that while the court below might hesitate to decide against the language of Warnock v. Davis, there has been no decision that precludes us from exercising our own judgment upon this much debated point. It is at least satisfactory to learn from the decision below that in Tennessee, where this assignment was made, although there has been much division of opinion, the supreme court of that state came to the conclusion that we adopt, in an unreported case,—Lewis v. Edwards, December 14, 1903. The law in England and the preponderance of decisions in our state courts are on the same side.

Some reference was made to a clause in the policy that "any claim against the company, arising under any assignment of the policy, shall be subject to proof of interest." But it rightly was assumed below that if there was no rule of law to that effect, and the company saw fit to pay, the clause did not diminish the rights of Grigsby, as against the administrators of Burchard's estate.

Decree reversed.

Mr. Justice LURTON took no part in the decision of this case.

RAHDERS, MERRITT & HAGLER v. PEOPLE'S BANK OF MINNEAPOLIS et al.

(Supreme Court of Minnesota, 1911. 113 Minn. 496, 130 N. W. 16, Ann. Cas. 1912A, 299.)

Appeal from District Court, Hennepin County; Horace D. Dickinson, Judge.

Action by Rahders, Merritt & Hagler against the People's Bank of Minneapolis and others. From the judgment, W. C. Daniels and others appeal. Affirmed.

LEWIS, J. From 1890 until 1907, Rahders, Merritt & Hagler were copartners in business in North Dakota, under the name Rahders, Merritt & Hagler. In 1907 a corporation was formed with the same name. Each former partner became the owner of one-third of the capital stock, and the business of the copartnership was transferred to the corporation, which acquired all of the assets and assumed all of the liabilities. In 1900 Merritt took out $5,000 insurance on his life, payable to his estate, and delivered the policies to the copartnership, and after the corporation was formed they were scheduled among the assets and turned over to the corporation. The premiums were all paid by the copartnership until the corporation was formed, and then one premium was paid by the company. By the agreement of the parties the money due on the policies was paid by the insurance company to the People's Bank, and this action was brought to secure judgment in favor of the corporation.

The trial court found that, while said partnership was conducting said business, the lives of the several members were insured by said copartnership for the benefit of said firm in the sum of $5,000 on the life of each partner; that all of the premiums on the policies taken out on the lives of the members were paid by said partnership as an expense of its business, and that the policies so taken out were delivered to and kept in the possession of said partnership; that the policies taken out by Mr. Merritt by inadvertence were not transferred or formally assigned to said partnership or to said corporation, but that the same were at all times the property of said copartnership until the organization of said corporation, and thereafter were the property of said corporation, and were at all times recognized by said Merritt as part of the assets of said copartnership, and of said corporation after its organization, and were listed and included by said Merritt in the statement of assets of said copartnership which were transferred to said corporation upon its taking over the business and assets of said copartnership—and ordered judgment for the corporation.

The administrators of the estate appealed, but do not question the findings of fact. They claim the right to recover upon the fol-

lowing propositions of law: First, that there was no insurable interest in the two other members of the copartnership at the time the policies were issued; second, if there was an insurable interest, then it became extinguished on the formation of the corporation; and, third, any assignment or change in the beneficiary by parol would be an unauthorized alteration of the contract of insurance.

1. The question of insurable interest is fully discussed in Bacon on Life Insurance, §§ 248, 250, where the leading authorities are collected. Any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. The essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazards of a life in which the insured has no interest. Conn. Life Insurance Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251; Loomis v. Eagle, 6 Gray (Mass.) 396. It does not require a very great interest to take a case out of the objection of being a wager policy. Each member of a copartnership certainly has an interest in the continuance of the lives of his copartners, growing out of the partnership relation. The necessities of the business incur more or less liability, which might be serious financially if one were removed by death. Conn., etc., Insurance Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. 949, 27 L. Ed. 800. This is the general rule, and we hold that the partnership in question had an insurable interest in the life of Mr. Merritt.

2. Among the assets turned over by the copartnership to the corporation, upon its formation in 1907, were the Merritt insurance policies, and two other policies held by the partnership upon the lives of the other two members. The three members of the copartnership were the charter members of the corporation, and the capital stock of $50,000 was divided equally among them, and so remained to the time of Mr. Merritt's death, at which time the corporation had paid one premium. The court found that the policies were issued for the benefit of the copartnership, and that the corporation when formed became the beneficiary. This is equivalent to finding that the contract of insurance was transferred, although there was no formal assignment of the policies. This finding was not attacked by the appellant; but it is denied that the corporation could legally become the beneficiary, because it had no insurable interest in the life of its stockholder, Mr. Merritt.

There is a great diversity of opinion on this question. In some jurisdictions it has been squarely held that a policy, though valid in its inception, is void in the hands of an assignee having no insurable interest in the life of the insured. Tate v. Building Ass'n, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 770; Cheeves v. Anders, 87 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 107; Metropolitan Life Insurance Co. v. Elison, 72 Kan. 199, 83 Pac. 410, 3 L. R. A. (N. S.) 934, 115 Am. St. Rep. 189, 7 Ann. Cas. 909; Bendet v.

Ellis, 120 Tenn. 277, 111 S. W. 795, 18 L. R. A. (N. S.) 114, 127 Am. St. Rep. 1000. The weight of authority, however, supports the rule that a policy, valid when issued, may be assigned as a chose in action to one having no insurable interest in the insured. Dixon v. National Life Insurance Co., 168 Mass. 48, 46 N. E. 430; Prudential Ins. Co. v. Liersch, 122 Mich. 436, 81 N. W. 258; Steinback v. Diepenbrock, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. Rep. 424; Rittler v. Smith, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844. The reasoning in support of this line of decisions is that the insured ought to be permitted to realize at any time on the value of his policy; that it is a species of property, and the value of life insurance as an asset would unnecessarily be lost, if not made assignable as other choses in action. Of course, good faith in the transaction is required, and the courts do not hesitate to condemn a policy issued for the purpose of having it assigned. See valuable note to Met. Life Ins. Co. v. Elison, 3 L. R. A. (N. S.) 934. Our own court, in Brown v. Equitable L. A. S., 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968, decided that a policy, valid when issued, was valid in the hands of a bank which had loaned money on it to the assignee of the insured.

The courts are not unanimous on the question whether a corporation has an insurable interest in its stockholders. An interesting discussion of this subject is found in Mechanics' Nat. Bank v. Comins, 72 N. H. 12, 55 Atl. 191, 101 Am. St. Rep. 650. But that question is not directly involved here, and it is unnecessary to determine whether this corporation might have taken out a policy on the life of Mr. Merritt. These policies were issued in good faith to the copartnership, and acquired in good faith by the corporation, and on authority and on principle that company is entitled to collect the amount of the policies as assignee.

3. It only remains to notice appellant's third point, that the assignment, if made, was by parol, and contrary to the terms of the written contract. There are three answers to this objection: First, the writing—that is, the policies—do not forbid an assignment of the contract, and do not provide in what manner an assignment shall be made; second, the court found that the policies became the property of the corporation, and appellant does not question the fact; and, third, the insurance company admits its liability on the policies, and makes no objection to the method of the transfer or assignment, and as between the assignor and assignee an assignment by parol was sufficient. Hogue v. Minn. Packing & Prov. Co., 59 Minn. 39, 60 N. W. 812.

Affirmed.

HARDY v. ÆTNA LIFE INS. CO.

(Supreme Court of North Carolina, 1910. 152 N. C. 286, 67 S. E. 767.)

Action by W. P. Hardy against the Ætna Life Insurance Company. From a judgment in favor of plaintiff on a demurrer, defendant appeals. Affirmed.

The complaint alleged that certain policies of insurance aggregating $3,000 had been taken out in October, 1907, by the plaintiff's uncle, P. M. Hardy, upon his own life and payable to his executors, administrators and assigns; that two weeks or more after issue of the policies they were assigned by P. M. Hardy to the plaintiff. This assignment was made with the consent of the defendant company and upon the motion of P. M. Hardy and not through the intervention of the plaintiff, who had no knowledge of the issue of such policies. It further averred that P. M. Hardy and the plaintiff, in addition to sustaining the relation of uncle and nephew to each other, were intimately associated, rendered each other mutual financial assistance, and held each other in mutual affection, that P. M. Hardy had died on the 8th day of April, 1908, and that proper proofs of loss had been furnished as required by the policy. By leave of the court, the administrator of P. M. Hardy was allowed to intervene, and filed a petition claiming the amount due on the policies on the ground that the assignment to the plaintiff was void for lack of insurable interest. The defendant demurred to the complaint of the plaintiff and also to the petition of the intervener, claiming that the attempted assignment to one without insurable interest rendered the policies void in toto, and that no recovery could be had thereon in favor of either the plaintiff or the intervener.[57]

HOKE, J. It is very generally held that the relationship of uncle and nephew does not of itself create an insurable interest in favor of either. Corson, Ex. of McLean, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479; Singleton v. Insurance Co., 66 Mo. 63, 27 Am. Rep. 321; Doody Co. v. Green, Guardian, 131 Ga. 568, 62 S. E. 984. But we are not called on to determine whether the additional facts set forth in section 6 of the complaint would bring about such an interest, for the reason that, on the facts as they appear, we are of opinion that if the assignment is otherwise valid, plaintiff has a right to recover the proceeds of the policies, whether at the time of the assignment he had an insurable interest in the life of the deceased or not.

It is accepted doctrine here, and elsewhere, that in order to a valid policy of life insurance there must have existed an insurable interest

[57] The statement of facts is abbreviated.

at the time the contract is entered into, and the question whether such a policy, valid at its inception, can be assigned to one who has no insurable interest has been very much discussed in the courts, and on this there is some conflict in the cases. We consider it, however, as established by the great weight of authority that where an insurant makes a contract with a company, taking out a policy on his own life for the benefit of himself or his estate generally, or for the benefit of another, the policy being in good faith and valid at its inception, the same may, with the assent of the company, be assigned to one not having an insurable interest in the life of the insured; provided this assignment is in good faith, and not a mere cloak or cover for a wagering transaction.

Decided intimation in favor of this general principle was given by this court in the recent case of Pollock v. Household of Ruth, 150 N. C. 211, 63 S. E. 940, and the position will be found sustained by a large number of authoritative and well-considered decisions and by text-writers of approved excellence. Insurance Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; Connecticut Mutual v. Schaefer, 94 U. S. 457, 24 L. Ed. 251; Crosswell v. Association, 51 S. C. 103, 28 S. E. 200; Rylander v. Allen, 125 Ga. 206, 53 S. E. 1032, 6 L. R. A. (N. S.) 128, annotated in 5 Ann. Cas. 355; Murphy v. Red, 64 Miss. 614, 1 South. 761, 60 Am. Rep. 68; Brown v. Greenfield Ins. Co., 172 Mass. 498, 53 N. E. 129; Mutual Life v. Allen, 138 Mass. 24, 52 Am. Rep. 245; Steinback v. Diepenbrock, Ex., 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. Rep. 424; Chamberlain v. Butler, 61 Neb. 730, 86 N. W. 481, 54 L. R. A. 338, 87 Am. St. Rep. 478; Moore v. Guarantee Fund, 178 Ill. 202, 52 N. E. 882; Prudential Co. v. Liersch, 122 Mich. 436, 81 N. W. 258; Cooley's Briefs on Ins. vol. 1, p. 262 et seq.; 1 Vance on Insurance, p. 140 et seq.

To quote from some of the cases referred to, in Steinback v. Diepenbrock, supra, it was held: "That one having no insurable interest in the life of another may acquire by assignment a valid policy upon his life and enforce it to the full amount." And in Murphy v. Red, supra: "The holder of a valid policy of insurance on his own life, payable to himself or his legal representatives, may assign the same for a valuable consideration, as he may any other chose in action, if there is nothing in the terms of the policy to prevent the assignment, and the assignee or purchaser of such policy, transferred according to its terms, is entitled to the proceeds of the same when due, notwithstanding he may have no insurable interest in the life of the insured."

In several cases, where the opinion apparently upholds the contrary view, it will be found that the cause was correctly decided and sustainable on the ground that the policy, though taken out in the name of the insured, was procured in pursuance of a scheme and

purpose to assign to one having no insurable interest, and that the proposed assignee was cognizant of the arrangement and took part in it. This was true in the case of Warnock v. Davis, 104 U. S. 775, 26 L. Ed. 924, and also in Cammack v. Lewis, 82 U. S. (15 Wall.) 643, 21 L. Ed. 244. In both of these cases the assignees were parties to the arrangement by which the policies were procured and assigned, and having no insurable interest in the life of the insured, the facts disclosed, as far as the assignments were concerned, a clear case of wagering contract on the duration of a human life, forbidden by the law, and the assignments were not allowed to stand. Accordingly, we find the same high court, in Life Ins. Co. v. Armstrong, supra, under a different state of facts, deciding the general principle: "That a policy of life insurance, without restrictive words, is assignable by the assured for a valuable consideration equally with any other chose in action, where the assignment is not made to cover a mere speculative risk, and thus evade the law against wager policies, and payment thereof may be enforced for the benefit of the assignee, and, under the procedure of many states, in his name."

Undoubtedly, however, there are decisions which directly hold that a life insurance policy, though valid at its inception, may not be assigned to persons having no insurable interest in the life of the insured; and North Carolina has been referred to as upholding this view both in text-books and in decisions of other courts. If this is a correct interpretation of our cases on this subject, we would not hesitate to hold that they were not well decided; but, while some of them certainly give color to this view, we think that a more careful consideration of our decisions will disclose that in all of them, where the contract was declared void or set aside, it appeared that the assignment of the policy to one having no insurable interest was made in pursuance of a preconceived purpose, and that the assignee had suggested the arrangement or been a party to it.[58] * * *

In Vance on Insurance, p. 140 et seq., the rule is thus stated: "That on principle, and according to the clear weight of authority, an assignment of a life policy to one having no insurable interest therein is perfectly valid if made in good faith, and not as a cover for fraudulent speculation in life."

And referring to the opinions of Warnock v. Davis, 104 U. S. 775, 26 L. Ed. 924, and Cammack v. Lewis, 82 U. S. (15 Wall.) 643, 21 L.

[58] Here the court distinguished Hinton v. Mutual Reserve Fund Life Ass'n, 135 N. C. 314, 47 S. E. 474, 65 L. R. A. 161, 102 Am. St. Rep. 545 (1904), Powell v. Dewey, 123 N. C. 103, 31 S. E. 381, 68 Am. St. Rep. 818 (1898), College v. Insurance Co., 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291 (1893), Burbage v. Windley, 108 N. C. 357, 12 S. E. 839, 12 L. R. A. 409 (1891), and Albert v. Insurance Co., 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693 (1898). A quotation from Crosswell v. Connecticut Indemnity Ass'n, 51 S. C. 103, 28 S. E. 200 (1897), is also omitted.

Ed. 244, and to the subject generally, the author says: "These confusing influences have further been aided and abetted by a catch phrase, which, however, does not state the issue fairly, to the effect that the law will not allow a person to procure by assignment insurance that he could not procure directly. A fair statement of the issue is found in the postulate that the law will allow the insured to designate a beneficiary under the policy as well by assignment as by original nomination. The true principle governing the question may be derived from the statement of some generally accepted rules of law:

(1) A person insuring his own life may designate any person whatever as beneficiary, irrespective of insurable interest in that beneficiary. (2) The law requires an insurable interest only at the inception of the policy, as evidence of good faith. The presence of such interest at any subsequent period is wholly immaterial. (3) Life insurance, though based on the theory of indemnity at its inception, is not a contract of indemnity, but chiefly of investment. As a chose in action it has at any time after its issue a recognized value, termed the 'reserved value.' Hence we conclude that a policy of life insurance, validly issued to one having an insurable interest, becomes in his hands a valuable chose in action, which should be assignable as any other property right, unless such assignment be opposed to some clear rule of public policy."

This, we think, correctly states the true doctrine, and, applied to the facts admitted, fully justifies the court below in overruling defendant's demurrer, and the judgment to that effect is affirmed.

Affirmed.[59]

[59] In the second trial of this case it was proved that the first premiums on the policies in suit were paid by the assignee. Upon the argument in the supreme court on appeal from a judgment in the trial court in favor of the plaintiff, the defendant contended that the fact of such payment by the assignee brought the case within the principle of Warnock v. Davis, 104 U. S. 775, 26 L. Ed. 924 (1881), and made the assignment clearly a fraudulent violation of the rule prohibiting insurance without interest. In response to this argument, the supreme court said: "It is also clear, we think, that the payment of the first premium by the plaintiff does not invalidate the policies, as it appears that he did not procure the issuance of the policies, and knew nothing of the transaction before the policies and assignments were brought to him." Hardy v. Insurance Co., 154 N. C. 430, 70 S. E. 828 (1911). The same conclusion was reached in Shea v. Mass. Benevolent Association, 160 Mass. 291, 35 N. E. 855, 39 Am. St. Rep. 475 (1894), and in Mut. Life Ins. Co. v. Blodgett, 8 Tex. Civ. App. 48, 27 S. W. 286 (1894). See, also, Ætna Life Ins. Co. v. France, 94 U. S. 565, 24 L. Ed. 287 (1876).

The rule announced in the principal case was expressly affirmed in Johnson v. Mut. Ben. Life Ins. Co., 157 N. C. 106, 72 S. E. 847 (1911). Compare with the principal case Trinity College v. Travelers' Insurance Co., 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291 (1893), in which it was held that a policy issued to the life insured, but immediately assigned to the college, which paid the first premium in accordance with a previous arrangement, was wholly void.

CHAPTER III

MAKING THE CONTRACT

SECTION 1.—THE AGREEMENT

TRUSTEES OF FIRST BAPTIST CHURCH v. BROOKLYN FIRE INS. CO.

(Court of Appeals of New York, 1859. 19 N. Y. 305.)

Appeal from the Supreme Court. Action to recover $5,000, the amount of an insurance against fire, alleged to have been made by the defendant. At the trial the plaintiff proved the execution, by the defendant, on the 21st of July, 1845, of a fire policy on the plaintiff's church, for $5,000, insuring the premises for one year. It contained a provision that the insurance might be continued for such further term as might be agreed on, "provided the premium therefor is paid and indorsed on this policy, or a receipt given for the same:" and one of the conditions annexed and forming a part of the contract was that "no insurance, whether original or continued, shall be considered as binding until the actual payment of the premium." The plaintiff proved two renewal receipts, executed by the defendant, one continuing the policy in force for one year from its date, July 21, 1846, and the other, dated July 21, 1847, continuing it in force for another year. It was admitted that the church was wholly destroyed by fire September 10, 1848.

The plaintiff then offered to prove that while the original policy was running, a verbal agreement was made between the plaintiff and defendant, that until notice to the contrary should be given by one party to the other, the defendant should renew the policy from year to year, without further notice, and give a certificate of renewal, and the plaintiff should pay the premium therefor on demand; that it was the usage of the defendant, from 1844 to 1849, to make such verbal agreements and to pay losses in pursuance thereof; that in pursuance of said agreement, in this case, the defendant renewed the policy in 1846 and 1847, and gave certificates of renewal, and after receiving such certificate, the plaintiff, within a few days, paid the premium therefor; and that the certificate given in 1847 was given after the 21st of July of that year. Upon objection by the defendant, the judge excluded the evidence, and the plaintiff took an exception. The judge then dismissed the complaint,

on the ground that no evidence was offered of a written contract, and the plaintiff took an exception. On appeal, the judgment for the defendant was affirmed at general term in the first district, and the plaintiff appealed to this court.

COMSTOCK, J. The alleged agreement on which the suit is founded was to renew a policy of insurance from year to year in consideration of a premium to be annually paid, either party being at liberty to give notice at any time that the arrangement would not be continued. Such an agreement although not in writing, is not void by the statute of frauds, on the ground that "by its terms it is not to be performed within one year from the making thereof." 2 R. S. 135, § 2. It is not the meaning of the statute that the contract must be performed within a year. If it can be so performed consistently with the language in which the parties have expressed themselves, in other words, if the obligation of the contract is not, by its very terms, or necessary construction, to endure for a longer period than one year, it is a valid agreement, although it may be capable of an indefinite continuance. An agreement, which either party can terminate at any time by a notice to the other, may be binding so long as the notice is not given, but it is not within the language or policy of the statute. Plimpton v. Curtiss, 15 Wend., 336; Moore v. Fox, 10 John. 244; Fenton v. Embler, 3 Burr., 1278; 2 Parsons on Con. 316, and note.

Aside from the objection just considered, contracts of insurance, whether executory or importing a present risk, are not required by any statute to be in writing; and we are therefore next to inquire whether, if made by parol, they are valid upon general principles of law. A policy of insurance is a mercantile contract, having its origin in, and deriving its incidents from, the usages and laws of commercial nations. In many of the countries of Europe the contract is required to be in writing by positive ordinances, which set forth minutely the circumstances and the stipulations which it ought to express. 1 Duer on Ins., 61. The same is true of marine insurances in Great Britain, a written policy being required by the Stamp Acts. 35 George III, ch. 63. Such is also, undoubtedly, the usage in this country; and, indeed, the very term "policy" imports that the party insured holds a written instrument to which that name has been given. It seems, however, that even in the continental countries of Europe, where formal policies are required by the codes of public law, unwritten agreements to insure will, in some circumstances, be executed by the courts of justice. 3 Boulay Du Paty, 246; 2 Valin, 20; Pothier, Traité du Contrat d'Assurance, n., 96, 97.

In this state, we have no positive law on the subject. The contract, as I have said, had its origin in mercantile law and usage. It has, however, become so thoroughly incorporated into our municipal system, that a distinction which denies the power and capacity of entering into agreements in the nature of insurances, except in particular modes and forms, rests upon no foundation. The common law,

with certain exceptions, having regard to age, mental soundness, etc., concedes to every person the general capacity of entering into contracts. This capacity relates to all subjects alike, concerning which contracts may be lawfully made, and it exists under no restraints in the mode of contracting, except those which are imposed by legislative authority. There is nothing in the nature of insurance which requires written evidence of the contract. To deny, therefore, that parol agreements to insure are valid, would be simply to affirm the incapacity of parties to contract where no such incapacity exists, according to any known rule of reason or of law. The Supreme Court of the United States, in a recent case in which the question directly arose, has determined that a parol agreement to make and deliver a policy of insurance, need not be in writing. Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co., 19 How. (U. S.) 318, 15 L. Ed. 636. We do not hesitate to adopt that conclusion, and it follows that the objection made at the trial to the agreement offered to be proved, so far as it rests upon this ground, cannot be maintained.

We come, then, to the question, whether the alleged parol agreement in this case was void by reason of any restraints contained in the charter of the defendants as a corporation. The defendants were chartered by an act of the Legislature passed in 1824. Laws of 1824, ch. 166, p. 175. The 1st section of the act declares that the company "shall be in law capable [amongst other things] of contracting and being contracted with relative to the funds of the said corporation and the business and purposes for which the said corporation is hereby created, as hereinafter declared." The 2d section declares "that the corporation hereby created is so created for the purposes aforesaid, and shall have power and authority to make contracts of insurance with any person or persons, body politic or corporate, against loss, etc., for such times or time, and for such premium or consideration, and under such modifications or restrictions, as may be agreed on between the said corporation and the person or persons agreeing with them for such insurance." The 10th section declares "that the policies of insurance, and other contracts founded thereon, thereafter to be made or entered into by the said corporation, though not under seal, if subscribed by the president, * * * and countersigned by the secretary, shall be binding and obligatory upon the said corporation, and shall have the like force and effect, to all intents and purposes, as if the seal of the said corporation had been or was affixed thereto."

The argument on behalf of the defendants is, that their charter, being the enabling act which alone authorized them to contract at all, and the 10th section having specified the mode of making contracts of insurance, all other modes and forms of making, or agreeing to make insurance are necessarily excluded, and, hence, that the parol agreement alleged to have been entered into with the plaintiffs was unauthorized and void.

It needs no argument or authority to prove that corporations must act within the powers conferred by the organic laws under which they are created. It may also, for the present purpose, be conceded, that they can disaffirm the most solemn and meritorious engagements entered into by them in excess of those powers. These rules are not inconsistent with another, which is, that corporations, along with the express and substantive powers conferred by their charters, take by implication all the reasonable modes of execution which a natural person may adopt in the exercise of similar powers. The business of insurance, for example, is not, in its nature, a corporate franchise. Any person may engage in it, unless forbidden by law; and his contracts of that nature, whether by parol or in writing, as we have seen, will be valid. So, when a general authority to engage in that business is given to a corporation in express terms, and there are no special restraints in its charter, it takes the power, as a natural person enjoys it, with all its incidents and accessories. It may bind itself in any mode and form of obligation which is not forbidden. If a private person can agree by parol to make insurance, so can a corporate body, unless the power of thus contracting is plainly denied to it by its organic law. That the use of the corporate seal to attest its contracts is unnecessary has long been settled.

Referring now to the charter of the defendants, we find, in the provisions above set forth, an authority to make contracts of insurance conferred in the most general terms. Unless the power thus given is specially restrained in the 10th section, it can be executed in any manner and form which the corporation may approve, and by any agents whom it may authorize to contract in its name. The power is to make "contracts of insurance." These may be in writing or by parol. They may be in the form of undertaking which imports a present risk completely assumed, or they may be executory, for the delivery of a policy or a renewal of a policy at a future day.

Does, then, the 10th section abridge the powers thus given, and confine the corporation to a particular mode of action, as well as to action through particular agents? We are clearly of opinion that it does not. This provision of the charter merely declares that the contracts of the corporation, without the corporate seal, and if signed and countersigned by the president and secretary, shall be valid and obligatory. Now, corporations always and of necessity act by agents; and, in granting their charters, it is a practice eminently covenient and proper, and, moreover, a very usual one, to specify the mode in which, and the agent or agents by whom, their contracts may be executed so as to bind the artificial body. Such a specification forecloses all question and doubt, and relieves the parties with whom contracts are thus executed from the burden of proving that the agents with whom they deal have acted by due authority. Buckley v. Derby Fishing Co., 2 Conn., 252, 7 Am. Dec. 271; Safford v. Wykoff, 4 Hill,

446, 447, per Walworth, Chancellor; Barnes v. Ontario Bank, 19 N. Y., 152. Such specifications do not subtract any thing from the general powers which corporate bodies take under their charters. Within those powers, they may contract in other modes; and all the authority which they possess, they may delegate to other agents. That the Legislature may restrict them in these respects is not denied; but restrictions of such a nature are founded in no policy, and they are rarely, if ever, imposed. They clearly are not contained in the charter under consideration.

It is further contended, that proof of the alleged agreement was inadmissible, on the ground that it was opposed to the stipulations for renewal contained in the written policy originally delivered, and would be in contradiction of the terms of that instrument. In the body of the policy, it was declared that the insurance (the risk not being changed) might be continued for such further term as should be agreed on, "provided the premium therefor was paid and indorsed on the policy, or a receipt given for the same;" and in the conditions annexed and forming a part of the contract, it was set forth that no insurance, whether original or continued, should be considered as binding until the actual payment of the premium. These clauses of the contract cannot have the controlling influence which is claimed for them. A provision in a policy already executed and delivered so as to bind the company, declaratory of a condition that premiums must be paid in advance, manifestly has no effect except to impart convenient information to persons who may wish to be insured. As such a provision in the policy in question could have no effect upon the delivered and perfect contract in which it was contained, so it could have none to prevent the same parties from making such future contract as they pleased. In any subsequent agreement for a renewal or continuation of the risk, it was competent for the parties to contract by parol, and to waive the payment in cash of the premium, substituting therefor a promise to pay on demand or at a future day. Proof of such an agreement would have no tendency to contradict or to change the written policy already in force between the parties, and which would be wholly spent before the new agreement could take its place. This is too plain to require further elucidation.

The judgment must be reversed, and a new trial granted.

Gray and Grover, JJ., expressed no opinion. All the other judges concurring.

Judgment reversed, and new trial ordered.

SCAMMELL et al. v. CHINA MUT. INS. CO.

(Supreme Judicial Court of Massachusetts. Suffolk, 1895. 164 Mass. 341, 41 N. E. 649, 49 Am. St. Rep. 462.)

Report from Superior Court, Suffolk County; James R. Dunbar, Judge.

Action by John W. Scammell and others against the China Mutual Insurance Company, for insurance. A verdict was directed for defendant, and the case reported to this court, judgment to be entered on verdict if the ruling was correct; otherwise, to stand for trial. Judgment on verdict.

KNOWLTON, J. The memorandum relied on by the plaintiffs as a contract is in the form of an application for insurance, containing a brief statement of particulars, and is marked "binding." At the bottom are the words, "Send policy to Walker & Hughes, 63 Wall street, New York." On its face it purports to be a preliminary and temporary arrangement, which contemplates the making of a full and definite contract in the form of a policy covering the same subject, with additional provisions. The premium which is to be paid as the consideration for the insurance, and which is, perhaps, the most important of the terms of the contract, is not fixed, but is left to be agreed upon when further information is obtained. At the time of the application the only information which the parties had in regard to the freight which was the subject of the insurance was derived from a very brief telegraphic message. Several of the particulars given in the application are stated in the most general terms, and against the word "premium" are written the words, "open for particulars."

It is contended with much force by the defendant that the memorandum lacks the essential features of a contract, in its failure to fix exactly the amount of the insurance, or to state the rate of premium, and authorities are cited which go far towards sustaining this contention. Hartshorn v. Insurance Co., 15 Gray, 240, 244, 247, 249; Insurance Co. v. Wright, 23 How. 401, 408, 409, 16 L. Ed. 524; Insurance Co. v. Ewing, 92 U. S. 377–381, 23 L. Ed. 610; Kimball v. Insurance Co., 17 Fed. 625; Hamilton v. Insurance Co., 5 Pa. 339; Strohn v. Insurance Co., 37 Wis. 625–631, 19 Am. Rep. 777. In order to bind the parties by a contract of insurance, all the essential elements of the contract must be agreed upon, but in a case like this, where it is impossible at the time to obtain important facts affecting the subject of their dealings, the parties may make a general agreement to accomplish their purpose as well as they can. The memorandum, applied to the admitted facts in this case, shows plainly that the parties desired to enter into a definite contract of insurance, in the form of a policy which should clearly state their rights and obligations. They had not sufficient facts in their pos-

session to enable them to determine what would be a reasonable rate of premium, and the defendant declined to fix the premium until further information could be obtained. The risk was to commence soon, and the plaintiffs desired to be protected from the inception of it. The defendant was willing to give them this protection on reasonable terms, and both parties doubtless expected that the additional information necessary to enable them to make the final contract for the voyage would soon be obtained. They therefore agreed that the insurance should be binding, to the amount of $3,000, temporarily, at a rate of premium which should be fair and reasonable, until such time as the rate could be fixed and the contemplated contract entered into. Each doubtless thought the other would act reasonably, by agreeing to a fair rate of premium, when the time should come for making the final contract, and each was willing to trust the other to that extent. Plainly, neither of them expected this to be anything more than a temporary arrangement to meet the emergency until further particulars could be obtained.

We think this was a binding contract for the purpose for which it was made. If the vessel had sailed, and had been lost at sea, before the plaintiffs had a reasonable opportunity to furnish the further particulars, the defendant would have been bound to pay the insurance, and the plaintiffs would have been bound to pay a premium, at a reasonable rate, for the risk as it was when the contract was made. If the plaintiffs, when they received the charter party, had communicated the additional information obtained from it to the defendant, the parties would probably have agreed upon a rate of premium, and have embodied their contract, as then made, in a policy. But, if they had been unable to agree upon the premium, their temporary contract would have been terminated by its own limitation; the plaintiffs would have been at liberty to seek insurance elsewhere, and would have been liable to pay the defendant, at a reasonable rate, for the time the insurance had continued. The legal effect of the memorandum is the same as if it stated, in terms, that the insurance should continue, at a reasonable rate of premium, until the plaintiffs had an opportunity to furnish the further particulars; that the plaintiffs would furnish them, and that both parties would then endeavor to agree upon a premium, and make a contract in the form of a policy. The plaintiffs were bound by their implied agreement to furnish the particulars without unreasonable delay, and upon their failure to do so the preliminary contract of insurance came to an end. This is in accordance with the decision in Baker v. Assurance Co., 162 Mass. 358, 38 N. E. 1124, although in that case the agents who made the agreement had their offices side by side in the same building; and it was held, upon the conflicting testimony, that there might have been a finding either that the parol contract was for insurance to continue temporarily, for a short time, until one of the agents should terminate it, or that it should contin-

ue only until the expiration of a reasonable time to enable the plaintiffs to ascertain in what terms they wished to take policies in writing. It was held that there was no evidence which would warrant a finding that there was a contract of insurance for a year.

In the present case all the additional facts necessary to enable the parties to complete their contract, and to put it in the form of a policy, were known to the plaintiffs as soon as they received the charter party. This was sent them by the master of the vessel, and they received it about September 12, 1890. The memorandum sued on bears date July 30, 1890. The vessel did not sail on the voyage by which the freight was to be earned until September 22, 1890. The two particulars of which the parties were ignorant, which were important in determining the rate of premium to be paid, were the nature of the cargo and the port of destination. The cablegram which furnished their only information on the subject was in these words: "The vessel is fixed to load on the spot. Wood, forty francs. Queenstown, etc. for orders. U. K. or continent." The charter party shows that the cargo was to be Quebracho wood, in logs, and contains stipulations in regard to their length, and how they should be loaded. The charter party also shows that the vessel was to proceed to Queenstown, Falmouth, or Plymouth for orders, and was liable to be ordered to any port in the United Kingdom, or on the continent between Hamburg and Havre, Rouen excepted. It also contains provisions in regard to the mode of giving the orders. There was uncontradicted testimony that this kind of wood was very heavy, and was considered an undesirable risk. There was also evidence, which was not disputed, that the language of the cablegram and of the memorandum, "on the continent," might include St. Petersburg and ports on the North Sea, for which rates of insurance for a vessel starting at that season of the year would be very high, and that the charter party included only the usual range of ports on the continent.

The plaintiffs' agent testified, and it was not denied, that he tried to have the defendant's agent fix the rate of premium when the application was presented, but the defendant's agent said he would rather leave it open for particulars of the cargo. There is nothing in the circumstances to show that the rate of premium was to be kept open for any other particulars than those which were shown by the charter party, and these were in the possession of the plaintiffs, at their office in St. John, 10 days before the vessel sailed. It was the duty of the plaintiffs to communicate these facts to the defendant at once, upon their receipt of them. Instead of doing so, they made no communication to the defendant until February 11, 1891, when they made a claim for a total loss. They broke their implied contract when they neglected to communicate these facts within a reasonable time after the receipt of the charter party.

Even if they were justified in waiting for the letter from the master of the vessel, which showed the exact quantity of the cargo, they failed to furnish the particulars to the defendant within a reasonable time, for they received this letter on October 27, 1890. This was almost two months before they got information of the loss of the vessel, which came by telegraph on December 16th. The vessel was abandoned at sea by the captain and crew on November 16th.

There is no ground for the contention that the contract contemplated a delay in fixing the premium until the voyage should be made to Queenstown, Falmouth, or Plymouth, and orders should be received there to proceed to the port of discharge. To wait for the receipt of these orders, and the communication of them to the defendant in the ordinary way, would be to postpone the making of the contract of insurance until after the termination of the risk. Upon the conceded facts of the case, the plaintiffs failed to furnish the defendant, within a reasonable time, with the facts which were to be the foundation of the contemplated substantive contract of insurance, and the incidental and temporary arrangement made at the time of the application expired by the limitation which was one of its implied terms. The construction which we put upon this preliminary arrangement, in regard to the undertaking of the plaintiffs to furnish additional facts without unnecessary delay, accords with the testimony of all the experts as to the usage in similar cases. This usage almost necessarily results from the fact that the essence of a contract of insurance is to provide indemnity upon the payment of an agreed sum, and not to insure for a price to be determined upon a quantum valebat after the termination of the risk.

We see no error in the exclusion of certain answers in the depositions offered by the plaintiffs. Only one or two of those answers, if received, would have had any tendency to show that the contract made in this case was to continue after the time when the plaintiffs should have furnished additional particulars to the defendants, and these were statements of the understanding of insurers, which were not competent to affect the interpretation which the law gives to such a contract. Odiorne v. Insurance Co., 101 Mass. 551–553, 3 Am. Rep. 401; Haskins v. Warren, 115 Mass. 514, 535, 536.

A majority of the court are of opinion that there should be judgment on the verdict.

DUFFY v. BANKERS' LIFE ASS'N OF DES MOINES.

(Supreme Court of Iowa, 1913. 139 N. W. 1087.)

Action for damages resulted in a directed verdict for defendant and judgment thereon. The plaintiff and intervener appeal. Affirmed in part and reversed in part.

LADD, J. The plaintiff is the widow of Joseph M. Duffy, who departed this life July 9, 1911. He had applied to the defendant association on June 8th preceding for a certificate of membership therein, stipulating the payment of an indemnity of $2,000 upon his death; but the association had failed to accept or reject the application, and, in this action, recovery of that amount as damages is sought by plaintiff, who was named as proposed beneficiary in the application, on the ground "that defendant negligently failed to take any action upon said application before the death of said Joseph M. Duffy and negligently failed either to issue to him a certificate of insurance as provided for therein or to reject said application and give him notice thereof in sufficient time to enable him to procure other insurance," and, in consequence of such negligence, she was deprived of the benefit of the insurance.

The widow, as a duly appointed and qualified administratrix, filed a petition of intervention, wherein she prayed judgment for damages to the estate of deceased on the grounds: "That defendant's said agent carelessly and negligently failed to send the application of said decedent to the home office of the defendant association after he had been examined by defendant's examining physician at Tama, Iowa; that, in consequence of such negligence on the part of said agent, no policy or certificate of life insurance was issued to said applicant by the defendant association; that, if said application had been forwarded by said agent to the home office of the defendant association as soon as said applicant was examined by defendant's examining physician at Tama, Iowa, the defendant association would have issued and delivered a policy or certificate of life insurance for $2,000 to said applicant before he died, and such insurance would have been in force at the time of his death." At the conclusion of plaintiff's evidence, the court directed a verdict for the defendant, and this is the only ruling of which complaint is made.

The facts admitted or proven on the trial first should be stated. The defendant is a mutual assessment insurance association. T. P. Rogers, at the time in question, was its general agent, and had authority from the association to take the application and receive the notes hereinafter mentioned. Duffy's application for membership in the association closed in words following: "I agree to accept the certificate of membership issued hereon and that the same shall not take effect until said certificate (signed by the secretary or assistant secretary) is issued and received by me during my continu-

ance in good health. This application and the certificate issued thereon, together with the articles of incorporation and by-laws (not reducing the insurance provided) which may be hereafter adopted, shall constitute the agreement or contract between me and the said association. I certify that I have carefully read the foregoing application. [Signature of the applicant in his own handwriting] Joseph M. Duffy." This was at the date mentioned, and at the same time the applicant executed to Rogers his promissory note for $17 as membership fee required to be paid when making such application, and delivered to Rogers a guarantee deposit note for $34 required by the articles of corporation and by-laws of defendant.

For these Rogers gave Duffy a receipt in the words following: "The Bankers' Life Association of Des Moines, Iowa. I have this day taken the application of Mr. J. M. Duffy of Tama, Iowa, for $2,000 insurance in the Bankers' Life Association, upon which he has given his guarantee note for $34.00 and paid in cash January 9, 1912, $17.00, all of which is to be returned promptly if the application is declined. The first quarterly payment on the insurance applied for will be due January 31, 1912. T. P. Rogers, Solicitor. Dated at ....., June 8, 1911." On the back of this receipt, this appears: "Agents should not promise that certificate will be issued in less time than is reasonably assigned to do the work, as disappointment may result, especially as frequently occurs, an extra amount of business comes in a bunch. The home office does all it can to expedite the issue and the agent can add material help if he will see that all applications are properly completed and full information given. If delay is unusual write for cause."

Rogers informed Duffy at the time he could go to the office of Dr. Thompson within a day or two for examination, and the application would then be sent to the association and explained to him; that the notes would be returned if the applications were rejected. To his inquiry as to how soon the insurance would be in force, Rogers responded, "Upon the passage of the physical examination required by their physician." Rogers left the application with Dr. Thompson on the same day, and two days later Duffy called and was examined by that physician, who informed the applicant that he had passed a satisfactory examination and that he (the doctor) had recommended him for membership of the association.

As required by defendant's rules, the physician mailed to Dr. Will, medical director of defendant, on the same day, a slip of paper signed by him showing that he had made the medical examination of Duffy, and this reached defendant's office June 12, 1911. Rogers had been in the habit of calling at Thompson's office for the application with the examination, and the doctor left these on the desk for him, where it remained until he learned that Duffy had drowned, whereupon the physician mailed them to defendant. The medical

examination disclosed that Duffy, who was 32 years of age, was in fine physical condition. He is conceded to have been a man of good habits, good financial ability, and of good moral character. He had done all that was required of him to obtain the insurance. The defendant was actively engaged through its agents in soliciting members of the association to whom certificates of insurance might be issued, and on an application of one Herman, procured by Rogers, June 5, 1911, defendant issued a certificate June 24th following. The defendant paid the $17 note out of its funds and caused it to be canceled July 28, 1911, after the association had been advised of the claim now made against it in this action, and it tendered the surrender of the guaranteed deposit note.

It is to be observed that the petition does not proceed on the theory that from the retention of the application and unreasonable time without acting thereon acceptance of the application is to be presumed, nor on the theory that defendant is estopped from denying such acceptance because of having misled the applicant in some way. See Winchell v. Iowa State Ins. Co., 103 Iowa, 189, 72 N. W. 503. The action is not based on contract either express or implied, but solely on tort; the theory of the plaintiff being that, having solicited and received the application for insurance, it owed the applicant the affirmative duty either of rejecting the application or of accepting it within a reasonable time, and upon breach of such duty it is liable for all damages suffered in consequence of such breach. Let us first ascertain whether the evidence was sufficient to carry the issues involved in such a claim to the jury.

I. Might defendant have been found to have been negligent? The association was responsible for the conduct of Rogers when acting within the scope of his agency, and it is admitted that he allowed the application to lie on the physician's desk a month lacking a day, though it was his duty to forward it promptly to the association. But he was not alone at fault, for the association was aware as early as June 12, 1911, that the application had been taken, and yet did nothing in the matter during the 27 days intervening his death. In the case of another application taken at about the same time and in the same vicinity there was a delay of but 19 days in issuing the certificate. We think whether defendant in the exercise of ordinary diligence should have passed on the application prior to Duffy's death was fairly put in issue. The association was bound by the acts of its agents and chargeable with any consequences that resulted from the failure of Rogers to promptly forward the application and physician's report. In other words, if the association was under a duty to promptly act on the application and notify Duffy, as we think it was, it cannot shield itself from the responsibility by the fact that the application and medical report had not been received by it and therefore it could not act. See Northwestern Mutual Life

Ins. Co. v. Neafus, 145 Ky. 563, 140 S. W. 1026, 36 L. R. A. (N. S.) 1211. The possession of these by its agent had the same effect as if they were in the possession of the association at its home office. Assuming then that the application and medical report had been promptly forwarded by the agent, and that the application was not accepted or rejected within the time intervening prior to his death, it seems manifest that whether this was an unreasonable delay was for the jury to determine, and we so hold.

II. But it is argued that it was as much the duty of the applicant to inquire as it was that of the insurer to give the information, and this or similar expressions will be found in several decisions holding that mere silence on the part of the insurer is not as strong evidence of acceptance as of rejection. Whether this were so or not, as bearing on whether an acceptance should have been inferred, it cannot be said that the duties of the parties were reciprocal. The applicant had done all he could or was required to do in the matter. He had the right to assume that the application would be forwarded immediately after the medical examination and was so assured. This, with the suggestion that the certificate would be in effect after passing the physical examination, was well calculated to lull him into supposed security. Moreover, about all he could have done was to withdraw his application and apply to another insurer for a policy, and this, one who has applied to a company of his choice would quite naturally hesitate to do. Under the circumstances, it cannot be said, as a matter of law, that the deceased was at fault in not stirring defendant to action by inquiry as to the cause of delay or in not withdrawing his application. At the most, this also was an issue appropriate for the determination of the jury.

III. Assuming then that the defendant was negligent and Duffy without fault as the jury might have concluded, can it be said that but for such negligence a certificate of insurance would have been issued? We think the jury might have found that, in all reasonable probability, had the association passed upon the application, it would have been accepted. Duffy was a young man of 32 years, his medical examination was satisfactory, and the physician had recommended him; his employment as a farmer was not hazardous, and his character all that could be desired. The association was actively soliciting members, and it seems to us that the record leaves little if any doubt but that, had the association ever passed on the risk, it would have been accepted and the certificate issued. As observed in Continental Ins. Co. v. Haynes, 10 Ky. Law Rep. 276: "It is to be assumed that the company will accept the risk if advantageous to it, which it must be, if fairly and honestly contracted for, because that is the business in which it is engaged, and that is the object for which its agent acted; and therefore to allow it, under the reservation of the right to approve, to reject simply because a loss has oc-

curred, would destroy the mutuality of the contract and inflict upon the party the misfortune he had provided against."

Contingencies might have arisen, as suggested by counsel for appellee, which would have led to a different conclusion, as, upon inquiry, it might have been ascertained that applicant was so venturesome or reckless in his conduct as to render him an undesirable risk. It is enough to say that the record contains no intimation that such was the fact, and it ought not to be inferred that other than the truth would have been elicited by any inquiries which the insurer might have prosecuted. If the applicant was of such disposition or temperament that the association would not, if it had acted, have accepted the application and issued the certificate, then no injury can be said to have resulted from the delay. Whether or not in all reasonable probability the certificate would have been issued had the association acted on the application can only be determined from the record as presented to the court.

But it is said that a certificate or policy of insurance is simply a contract like any other, as between individuals, and that there is no such thing as negligence of a party in the matter of delay in entering into a contract. This view overlooks the fact that the defendant holds and is acting under a franchise from the state. The legislative policy, in granting this, proceeds on the theory that chartering such association is in the interest of the public to the end that indemnity on specific contingencies shall be provided those who are eligible and desire it, and for their protection the state regulates, inspects, and supervises their business. Having solicited applications for insurance, and having so obtained them and received payment of the fees or premiums exacted, they are bound either to furnish the indemnity the state has authorized them to furnish or decline so to do within such reasonable time as will enable them to act intelligently and advisedly thereon or suffer the consequences flowing from their neglect so to do. Otherwise the applicant is unduly delayed in obtaining the insurance he desires, and for which the law has afforded the opportunity, and which the insurer impliedly has promised, if conditions are satisfactory. Moreover, policies or certificates of insurance ordinarily are dated as of the day the application is signed, and, aside from other considerations, the insurer should not be permitted to unduly prolong the period for which it is exacting the payment of premium without incurring risk.

What was said in Northwestern Mutual Life Ins. Co. v. Neafus, 145 Ky. 563, 140 S. W. 1026, 36 L. R. A. (N. S.) 1211, is pertinent: "If in this case there was evidence that the company was induced to reject the application for the sole reason that Neafus died before it acted upon it, or to show that his application, except for the fact of his death, would have been approved, we would have a very different question. We think there is a sound and well-defined distinc-

tion between a case in which the application under no circumstances would have been accepted and a case in which it would have been accepted, except for the fact that the applicant died before it was acted upon, and after the company had a reasonable time in which to act. While the application and receipt are to be treated merely as a proposal for insurance that it is with the company at its election to accept or reject, it may well be said that the company must act honestly and fairly on the application submitted to it, and which it impliedly at least agreed to accept, if satisfactory to it; and that if an application is satisfactory, and the company, if it had acted in a reasonable time, would have accepted the risk, it should not be allowed after holding the application for an unreasonable time to reject it, solely because of the death of the applicant. But, treating the case as we find it in the record, the delay, however unreasonable it may have been, cannot be construed into an acceptance of an application that no well-managed company, in the ordinary course of its business, would have accepted."

In Boyer v. State Farmers' Mutual Hail Ins. Ass'n, 86 Kan. 442, 121 Pac. 329, 40 L. R. A. (N. S.) 164, recovery for the amount of insurance applied for was awarded because of negligent delay in not issuing the policy until after the loss, and in a note to the case as reported in 40 L. R. A. (N. S.) 164, the annotator says that: "Whatever may be the decision of the jury on this question (delay), it cannot be doubted that the proposition that an insurer should be held liable for a loss sustained by an applicant for insurance because of the negligence of the insurer's agent in failing to forward the application within a reasonable time is sound."

In Walker v. Farmers' Ins. Co., 51 Iowa, 679, 2 N. W. 583, the trial court instructed the jury that, if the agent had only the power "to receive and forward applications to the company for their approval or rejection, then, as such, he would be held to the use of ordinary diligence, and the defendant would be liable for his negligence in the performance of such duty; and if you find that said agent neglected to forward such application for rejection or approval within a reasonable time, considering all the circumstances, then the defendant must be held liable for any loss occasioned by such neglect." Of this, the court said: "It may be, but the point we do not decide, that defendant is liable for the neglect of its agent as contemplated in this instruction; but in order to recover for such negligence the action must be based thereon and the petition must so declare." And the instruction was held to be erroneous for that no such issue was raised on the pleadings. We are inclined to the opinion that the principle announced in this instruction is sound and that the facts of the case were such as to require its application.

IV. The application named plaintiff as his beneficiary, and, had the certificate issued, likely she would have been named therein as

such. But there was no contract, and the negligence, if any, was that of failing to discharge a duty owing the deceased. Had the certificate issued, whether plaintiff or some one else were beneficiary would have been optional with the insured, and as the injury, if any, was to him, his representative alone can maintain the action for resulting damages. See Schmidt v. Association, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323.

As to plaintiff the judgment is affirmed. Because of the error in not submitting the issues to the jury, the judgment against the intervener is reversed.

PRESTON, J., takes no part.[1]

SECTION 2.—THE FORM

SALISBURY et al. v. HEKLA FIRE INS. CO. OF MADISON, WIS.

(Supreme Court of Minnesota, 1884. 32 Minn. 458, 21 N. W. 552.)

Appeal from an order of the district court, Hennepin county, denying motion for a new trial.

GILFILLAN, C. J. Defendant, by its agent at Minneapolis, made orally a contract with plaintiffs, acting by their agent, insuring plaintiffs' building used as a manufactory in the sum of $150, and the stock and machinery therein in the sum of $350, against loss by fire, for a premium at the rate of 6 per cent. on the amount of insurance for one year, the risk to commence at once, to-wit, February 17, 1883; a written policy to be made and delivered as soon as could be done. The premium was not then paid, and nothing was said as to when it should be. On the night of February 18th, the manufactory then running, the property insured was destroyed by fire. On the morning of the 19th, after the fire, defendant's agent delivered to plaintiffs' agent a policy of insurance. February 23d, plaintiffs paid the premium. In the oral agreement nothing was said about any conditions or restrictions of insurance. In the policy delivered there was a condition that it should be void if the manufactory should run at night or overtime, or cease to be operated, without the consent of defendant indorsed on the policy.

The controversy is as to whether that condition attached to the contract of insurance under which the loss occurred. Was that condition a part of the contract existing at the time of the fire? Unless it was, it has no influence on the rights of the parties. Whether it was or not must be determined by what was said between them or

[1] See the comment on this case in 27 Harvard Law Rev. 92.

agents when the insurance was effected. The written policy made out by the defendant after the fire, of course, cannot be conclusive. Indeed, having been made after the liability accrued, it would be no evidence of the contract at all, were it not for its delivery to and retention by plaintiffs. Such delivery and retention may be taken as an admission by plaintiffs that it set forth the terms of the contract as agreed on, which might be rebutted by proof of what the contract actually was. And in view of the fact indicated by the evidence, that the plaintiffs did not read it, it would not be very strong evidence as an admission. It stands on an entirely different footing from a policy delivered and accepted before the loss. For in that case, if there be no fraud or mistake, the policy in the contract, (from the time of its delivery, at any rate,) no matter what may have been the negotiations which led to it, and proof of such negotiations is not admissible to contradict its terms.

This policy did not exist and was not the contract at the time of the fire, when defendant's liability accrued. The only contract then in force was oral, and the rights of the parties must be measured by it. Upon an oral contract of insurance, where nothing is said about conditions, if a policy is to be issued the parties are presumed to intend that it shall contain the conditions usually inserted in policies of insurance in like cases, or as have been before used by the parties. That a particular condition is usual must be shown by the party who insists upon it, who has the affirmative. There was no evidence that such a condition as this is usual. Order affirmed.

HICKS v. BRITISH AMERICA ASSUR. CO.

(Court of Appeals of New York, 1900. 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424.)

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Georgiana Hicks against the British America Assurance Company on a contract. From a judgment in plaintiff's favor (43 N. Y. Supp. 623), defendant appeals. Reversed.

PARKER, C. J. We are agreed that the verdict of the jury establishes that on the 30th day of December, 1893, defendant's agent Hobart had a conversation with Col. Hicks, plaintiff's assignor, the legal effect of which was to create a contract of present insurance in the sum of $2,500 upon property of Col. Hicks, which was consumed by fire two days later. The agreement that the contract was one of present insurance accords with the allegations of the complaint, the theory of the counsel as shown by their method of trial, and the charge of the court. That position cannot be attacked from any source, for either that which was said operated to create a contract of present

insurance, or else no contract was ever made binding upon the defendant. The evidence tended to show a contract to insure, and nothing else. It is not pretended that a contract of any kind between these parties was made after the conversation of December 30th. The jury have found that the defendant's agent said to Hicks, after a general discussion on the subject of insuring the property, "You are insured from noon on the 30th day of December, 1893, to noon of December 30, 1894." The legal effect of this answer to the application for insurance made by Col. Hicks was to create a complete, binding agreement for insurance for the period named, upon which he was entitled to recover for the damages sustained by the fire, had he made performance on his part. Ruggles v. Insurance Co., 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674.

This contract of insurance, although verbal, embraced within it the provisions of the standard policy of fire insurance, which the legislature in its wisdom formulated for the protection of both insured and insurer. It is usual for the company to issue a policy of insurance evidencing the contract between the parties; but the policy accomplishes nothing more than that, for, when the contract is entered into between the agent and the owner, whether the binder be verbal or in writing, it includes within it the standard form of policy, and the contract is a completed one. Ruggles Case, supra; Lipman v. Insurance Co., 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719; Karelsen v. Sun Fire Office, 122 N. Y. 545, 25 N. E. 921; Underwood v. Insurance Co., 161 N. Y. 413, 55 N. E. 936. In the three cases last cited the binder had been reduced to writing, but there is no distinction whatever in principle between those cases and the one at bar, for in each there is a binding contract to insure, and necessarily according to the only form of insurance contract authorized by the laws of this state. The law reads into the contract the standard policy, whether it be referred to in terms or not. In Lipman's Case, supra, Judge Andrews, in speaking of the construction to be put upon the binding slip, issued in that case, said: "The construction is, we think, the same as though it had expressed that the present insurance was under the terms of the usual policy of the company to be thereafter delivered." And in Karelsen's Case the court said: "While the binding slip contained none of the conditions usually found in insurance policies, the contract evidenced by it was the ordinary policy of insurance issued by the company. So that, in any construction of the contract, it must be regarded as though it had expressed that the present insurance was under the terms of the usual policy of the company to be thereafter delivered."

So that all this plaintiff had to do, in order to recover in this action, aside from showing a loss by fire, and compliance on her part with the conditions of the contract, was to prove the making of the contract. This was accomplished by proving the conversation between her assignor and the agent, for the conversation disclosed the sum

for which the property was to be insured, the amount of premiums, and the period of insurance, and the statute provided for all of the other conditions of the contract of insurance. Neither party to it had the right to add to or take from the requirements of the legislature in that regard. The making of the contract the plaintiff proved to the satisfaction of the jury, and she did not attempt to prove anything more. This the trial court, as well as the counsel, understood, and the case was tried upon that theory. It has been discovered in this court, however, that the judgment against the defendant cannot be sustained if this action be now treated in accordance with the theory that induced its commencement, and upon which it was tried, namely, that the plaintiff's assignor made a valid contract of insurance with the defendant, by virtue of which this plaintiff, as assignee, is entitled to recover to the extent provided for by the policy for the damages sustained by her through the destruction by fire of the building insured.

The error which calls for a reversal of the judgment, if this be treated as an action on the contract, lies in the trial court's charge to the jury, in effect, that, as matter of law, it was not necessary for the insured to present to the defendant proofs of loss in accordance with the requirements of the standard policy. To avoid this result, it is proposed in the dissenting opinion not only to set at naught the many decisions of this court holding that on an appeal a case must be disposed of upon the theory upon which it was tried (Snider v. Snider, 160 N. Y. 151, 54 N. E. 676; Stephens v. Meriden Britannia Co., 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678; People v. Dalton, 159 N. Y. 235, 53 N. E. 1113; Drucker v. Railway Co., 106 N. Y. 157, 12 N. E. 568, 60 Am. Rep. 437; Baird v. Mayor, etc., 96 N. Y. 567), but also to decide that, growing out of this contract, the plaintiff had another cause of action, the maintenance of which did not require the service of proofs of loss. Hence it is claimed that, by treating the case as having been tried upon that theory, the court may avoid reversing the judgment, for in such a case it would have been unnecessary to charge that the service of proofs of loss was essential to recovery. This newly-discovered cause of action is said to spring out of the promise, made at the time the contract was entered into, that the defendant would deliver to the insured evidence of the contract in the shape of a policy of insurance. The contract was completed at the moment the agent said, "You are insured from noon on the 30th day of December, 1893, to noon on the 30th day of December, 1894" (Ruggles v. Insurance Co., supra); and it is agreed by every member of this court that the defendant is liable to the plaintiff on the contract thus made in the full amount of the policy, if the damage was sustained in the manner referred to in the policy, and plaintiff performed the conditions imposed upon him by it.

But it is said that he may recover either on the contract, or, instead, if he elects, on the ground that the defendant failed to deliver

to him written evidence of the contract; i. e. a policy of insurance. If the case were one where the written evidence of the contract had to come into the possession of the plaintiff before recovery could be had thereon, then it is true that an action in equity might be brought, praying for a delivery of the policy that the defendant withheld, and further demanding that, upon the policy delivered in pursuance of the decree, the plaintiff should have judgment in the amount specified in the policy for her damages by fire; and even then the plaintiff would have to abide by the terms of the policy, delivery of which the judgment should decree. But that is not this case at all. To enable her to recover, it was not necessary for this plaintiff to have physical possession of the policy which the agent promised to give her assignor. Ruggles Case, supra. Her action was not founded upon a policy, but upon the contract of insurance made upon the 30th day of December, which, as both parties agreed, was to begin at noon on that day, no matter when the policy, which the parties intended should furnish evidence of the contract, should be delivered. The action was brought, tried, and decided upon that theory; and no one disputes that the judgment could in this court stand upon that theory, had the trial court charged the jury correctly in relation to the necessity of serving proofs of loss. It is apparent, therefore, that the plaintiff sustained no damage by reason of the defendant's failure to furnish her assignor with written evidence of the contract. Had the promise been kept, the plaintiff might not have been obliged to call her assignor to prove the contract, thus subjecting him, as it turned out, to be confronted with impeaching testimony; but neither the plaintiff nor her assignor was otherwise damaged, for he found no difficulty in proving a contract to the satisfaction of the jury. The possession of the promised policy, therefore, would have been a convenience possibly, but nothing more. Plainly, therefore, it is not true that the plaintiff suffered damage in the amount of the contract of insurance by reason of the failure of the defendant to deliver a policy reciting the terms of the contract entered into, and hence the judgment cannot be affirmed on the ground that the plaintiff sustained damages in the sum of $2,500, because the defendant omitted to deliver a policy. Nor do I think that a sound public policy would sanction the creation of such a precedent even if a legal principle could be found upon which to rest it.

The legislature of the state of New York has prescribed a standard form of policy for the protection of both insurer and insured. It contains provisions specially protecting the insured from harsh methods by insurance companies. On the other hand, it provides that which experience has shown to be necessary in order to protect insurance companies from being victimized through fraud; and among the conditions which the legislature, in its wisdom, has caused to be incorporated into the standard policy is one making it necessary that the insurer shall have immediate notice of the facts and

circumstances of the fire; another, that within 60 days the owner shall present proofs of loss, duly verified, in which shall be stated the circumstances of the fire, and the value of the property destroyed, and various other things which it is deemed important that insurance companies should know before being called upon to adjust a loss; still another provides that no local agent shall have the power to waive any of these written conditions, except by a writing. It is unnecessary to present the reasons which induced the legislature to require these conditions precedent to a recovery upon a policy of insurance. It is sufficient for our purpose that the legislature declared that it should be so, and we should see to it that the general trend of our decisions is towards the enforcement of the legislative command, instead of its nullification. This plaintiff had the right, as it is conceded on all hands, to recover on the contract of insurance which her assignor made with the defendant's agent, whether a policy was subsequently delivered to him or not; but, as the standard policy was necessarily a part of the contract, he should be required to comply with the conditions of that policy, and give notice of the facts and circumstances of the fire, and present proofs of loss duly verified.

The view taken by some of my Brethren, however, is that it was unnecessary to give notice of the fire and present proofs of loss within 60 days, or at any other time, because, it is said, such an action need not be treated as on a contract of insurance, but on a contract to give a policy, which has not been carried out, and, therefore, prior to beginning suit, which may be done at any time within six years instead of one year, as provided in the standard policy, the insured has nothing whatever to do when he sustains a loss by fire but lie by until, as in this case, several months have passed, or, in some other case, until years have gone by, without giving the company notice of the fire or any proofs of loss whatever. He may then bring a suit, claiming that two days, or less, or more, before the fire, the defendant's local agent, without receiving any premium, agreed to, but did not, issue a policy, for which defendant is liable to plaintiff in the amount of the sum for which it was agreed that the policy should issue. If such a procedure should be sanctioned by this court, then might an insurance company be mulcted in damages without having had an opportunity to investigate promptly the origin of the fire and the value of the thing destroyed, and thus would the door be opened wide for the perpetration of fraud.

It is said that, if the foregoing argument seems not to be defective upon its mere reading, it is, nevertheless, so, because it leaves out of consideration the decisions of this court in Ellis v. Insurance Co., 50 N. Y. 402, 10 Am. Rep. 495; Angell v. Insurance Co., 59 N. Y. 171, 17 Am. Rep. 322; Van Loan v. Insurance Co., 90 N. Y. 280. But the situation which those cases were designed to meet no longer exists. During the period of time in which they and oth-

ers were decided, and down to the year 1886, each insurance company was at liberty to insert such provisions in the policy of insurance issued by it as it deemed best. The result was that there was no uniformity in policies of insurance, and, when loss by fire occurred prior to a delivery of the policy, it became necessary for the assured to secure possession of the policy, either by its voluntary delivery to him by the officers of the company, or in pursuance of a decree in a suit in equity for specific performance. Thereon he could found a judgment for the damages sustained by the fire, or he was allowed to recover the damages sustained for a breach of the contract, which was treated as a contract for the delivery of a policy. The last one of the cases cited was decided in 1882. Four years later the legislature, by chapter 488 of the Laws of 1886, enacted and provided for a uniform policy of fire insurance, to be made and issued in this state by all insurance companies taking fire risks on property within this state, to be known and designated as the "standard fire insurance policy of the state of New York." Upon the passage of this important legislation the policy of insurance was no longer of special moment, except as evidence that a contract to insure had been made; for it was no longer competent for the parties to incorporate into the policy any provisions whatever outside of those embraced within the terms of the standard policy, and thereafter the contract to insure was, by common consent of the profession and the courts, scientifically treated as a contract of insurance, and not, as formerly, a contract to issue a policy, as an examination of the authorities in this court from the Ruggles Case down will show.

It is suggested that an affirmance of the judgment might also be placed on the ground that, while the action was brought upon the contract of insurance, it was made to appear upon the trial that the defendant, by its conduct, waived service of proofs of loss, and hence that it was not error for the court to charge, in effect, that the plaintiff could recover without showing that she had complied with the terms of the contract in that respect. If the defendant had, by its conduct, rendered unnecessary the service of proofs of loss, the contention would, of course, be well founded. But it had to do something in order to lose the benefit of the stipulations in its contract. At the outset it should be said that the defendant or its officers never did anything whatever until after this action was commenced. Neither the plaintiff nor her assignor, so far as this record discloses, ever addressed any letter or other communication to the defendant or any of its officers prior to the commencement of this action. What, then, is the alleged waiver founded upon? Why, upon the action of the local agent who made the contract of insurance in denying that he ever made such a contract,—an unstable and worthless foundation, surely, in view of the fact that under the

standard policy an agent is without power to waive any of the conditions, as this court has time and again held. Van Allen v. Insurance Co., 64 N. Y. 469; Quinlan v. Insurance Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645; Bush v. Insurance Co., 63 N. Y. 531; De Grove v. Insurance Co., 61 N. Y. 594, 19 Am. Rep. 305. While it is conceded that the local agent had no power in such a case to waive the condition regarding proofs of loss, yet it is contended that he did in fact waive it by omitting to deliver the policy when called for by the owner of the building after the fire, and by denying that he had ever made a contract to insure.

Stating the contention in other words, it is that, if the agent had tried to waive the conditions of the policy, and had promised to do so, he could not have accomplished it; but that, by omitting either to do or to say a particular thing, he did waive the condition, which is to say that an express waiver would not be effectual, but an implied one would. As the statement of the proposition seems to furnish the answer to it, I pass on to such of the defendant's acts as are relied upon to constitute a waiver. It is not pretended that prior to the commencement of this action the plaintiff or her assignor ever notified the defendant company that she claimed that the company had insured the burned building, so there is nothing before action brought upon which to base a claim that the defendant waived proofs of loss. But it is said that when the suit was brought, and the defendant, by its answer, denied the allegations of the complaint, it in some way made good the attempted waiver of the agent, although it was absolutely void before. The answer is that, if the plaintiff had not a complete cause of action against the defendant when the summons was served, no obstacles have been removed from her path by the denials in the defendant's answer of the allegations of her complaint. If a party has not a good cause of action before commencing suit, it is safe to say that he will not get one by an answer of the defendant which contents itself with denying the existence of the facts alleged in the complaint. It is plain, therefore, that the plaintiff is without a basis for a recovery upon this cause of action if a new trial be granted, because neither she nor her father, the assignor, have presented to the defendant any proofs of loss, nor was service of proofs of loss waived by the defendant; and, while such a result may or may not be in the interest of justice, in this particular case there can be no doubt that the measure of injustice done, if any, will be far less than would necessarily ensue from a decision putting a premium upon insurance obtained without a policy, by making it possible to recover for the damages sustained through a fire by an action commenced at any time before the six-years statute of limitations shall have run, and that, too, without giving the company notice of the fire, or serving it with proofs of the loss; thereby preventing it from being

able to inquire about the facts and circumstances attending the fire until months or years after the happening of it. This would in many cases effectually prevent the company from acquiring any information whatever.

It follows, if the views expressed be sound, that the action is upon a contract of insurance, and not one for damages resulting from a failure to deliver a policy, and hence that proofs of loss were necessary, in the absence of a waiver thereof by the defendant, of which there is no proof; and the failure to so charge was error calling for a reversal of the judgment. The judgment should be reversed.

WERNER, J. (dissenting). It seems to me that we cannot hold that an action may not be brought for the breach of an agreement to insure without distinctly overruling Ellis v. Insurance Co., 50 N. Y. 402, 10 Am. Rep. 495, Angell v. Insurance Co., 59 N. Y. 171, 17 Am. Rep. 322, Van Loan v. Insurance Co., 90 N. Y. 281, and Post v. Insurance Co., 43 Barb. 351. I do not think that the evidence wholly justifies the statement that the action was clearly tried upon the theory of an executed contract of insurance. It is true that the complaint, and the evidence given in support thereof, were undoubtedly appropriate to such an action; but it does not follow that they were, therefore, not appropriate to an action for damages arising out of the alleged breach of the contract to insure. It frequently happens that the same pleadings and proofs will support different causes of actions which are governed by inconsistent legal principles. I am prepared to agree with Chief Judge PARKER, in holding that under the law providing for the standard policy it is the logical rule to decide that every contract for insurance made with an authorized agent, whether the same be oral or written, constitutes a valid contract of insurance, which requires nothing to complete it except the written evidence of its terms and conditions. The cases of Lipman v. Insurance Co., 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719, Karelsen v. Sun Fire Office, 122 N. Y. 545, 25 N. E. 921, and Underwood v. Insurance Co., 161 N. Y. 413, 55 N. E. 936, cited by him, clearly demonstrate that this is the more recent view of our court. But that is very different from deciding that, when a plaintiff claims that a contract for insurance has been made and broken, and a defendant insurance company denies that any such contract was ever made, a plaintiff can recover only upon the theory of an executed and completed contract. Such a rule would result in exempting insurance companies from the application of one of the most familiar principles of the law of contracts. It is a rule of universal application that when a party to a contract refuses to execute it the other party thereto may treat it as rescinded, and sue for the breach. Beach, Mod. Law

Cont. § 788. In such a case as this the difference in the character of the action is one of form, rather than of substance, because the recovery in either case would be the same.

But let us assume that it is now the established law that a party claiming under an oral or a written memorandum for insurance must recover, if at all, upon the terms and conditions of a completed policy, which are to be read into his tentative contract. It is conceded that Hobart was the duly-authorized agent of the defendant for the purpose of issuing policies of insurance. He was provided with blanks for that purpose, which needed only to be countersigned by him to make them executed and binding contracts. The right to issue policies included the right to refuse to issue them. Hobart's agreement to issue a policy was the act of the company. Whose act was Hobart's refusal to issue a policy after he had bound the company by his agreement to issue one? To my mind there is no escape from the conclusion that, if he acted for the company in making the agreement, he acted in the same capacity in breaking it. There was a dispute of testimony as to whether he ever made such an agreement with plaintiff's assignor. This presented a question of fact which the jury have settled in favor of the plaintiff. If, then, we treat this as an action upon the policy, and hold the defendant responsible for the acts of Hobart, what is the effect of such acts? The answer seems obvious. If the defendant, through its proper officers, had issued a policy of insurance, and after a loss under the same had denied its liability on the ground that it never made any such contract, it would be a distinct waiver of the right to demand proofs of loss. Shaw v. Insurance Co., 69 N. Y. 286; Stokes v. Makay, 147 N. Y. 223, 41 N. E. 496; People v. Empire Mut. Life Ins. Co., 92 N. Y. 105; May, Ins. § 469; Port. Ins. (Am. Notes by Darrach, 1889), star p. 194; Richards, Ins. § 81; Grattan v. Insurance Co., 80 N. Y. 281, 36 Am. Rep. 617; Payn v. Relief Society, 2 How. Prac. (N. S.) 220; Insurance Co. v. Pendleton, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866; Brink v. Insurance Co., 80 N. Y. 113. Is the result any different because these things were done by an agent? As we have seen, this agent had authority to issue, and therefore to refuse to issue, policies. His agreement to issue a policy was the act of his principal. His refusal to issue a policy after he had agreed to do so falls within the same category. Under these circumstances the refusal of the agent has the same effect as though it had actually been made by the principal. Indeed, for the purposes of the particular act, he was the principal. Goodwin v. Insurance Co., 73 N. Y. 490, 491.

But it is suggested that the policy provides that no agent shall have power to waive any of the conditions thereof. This is undoubtedly true after a policy has been issued, and the limited

powers of the agent are spent. But in the case before us the acts of the agent were within the scope of his authority, for, until the policy was actually issued, he was the alter ego of the defendant. At every instant within the period covered by the negotiations between Hobart and the plaintiff's assignor the former was acting within the scope of his authority. As the case stands, it is just as though the defendant itself had refused to issue a policy after it had agreed to do so. Under these circumstances the plaintiff and her assignor were not required to present proofs of loss, because they had been absolved from this duty by the acts of the defendant. If these views are adopted, it follows that the charge of the trial court was substantially correct wherein it stated that it was not necessary for the plaintiff to serve proofs of loss, and by the same rule it would seem to follow that the instructions relating to the waiver by Hobart were harmless, because they were immaterial.

GRAY, O'BRIEN, and CULLEN, JJ., concur with PARKER, C. J., for reversal. LANDON [2] and WERNER, JJ., read for affirmance, and HAIGHT, J., concurs with LANDON, J.

Judgment reversed, etc.[3]

[2] The vigorous dissenting opinion of Landon, J., is omitted. In accord with the opinion of Werner, J., is Chenier v. Ins. Co. of North America, 72 Wash. 27, 129 Pac. 905, 48 L. R. A. (N. S.) 319 (1913). See, also, extensive note, 48 L. R. A. (N. S.) 319–325.

[3] EFFECT OF STANDARD POLICY ACTS.—"A glance at the history of the standard form of policy makes it very clear that the legislature of this state intended to deprive fire insurance companies of the right to add to or change the terms and conditions of the prescribed form. The right to make such changes and additions is one of the principal distinguishing characteristics of the two classes of standard forms. The Massachusetts and New York standard policies went into effect about the same time and have formed the models for the legislation in other states. Both states were seeking uniformity of insurance contracts, but Massachusetts did not attempt to deprive the parties of the liberty of making their own contracts. It merely adopted a model which the parties were at liberty to modify at will. But New York went further and determined the form which all must use, with the privilege of adopting certain prescribed clauses to cover particular conditions. The Minnesota act of 1889 imposed upon the insurance commissioner the duty of preparing a standard form of policy which should be obligatory after that year. The New York form was prepared and went into use, but the act was declared unconstitutional, because it attempted to delegate legislative powers to the insurance commissioner. In 1895 the legislature adopted the Massachusetts form, with such modifications as were necessary to avoid conflict with the valued policy law. Section 53 provided that a company may write upon the margin or across the face of the policy, or write or print in type not smaller than long primer upon separate slips or riders to be attached thereto provisions adding to or modifying those contained in the standard form. The insurance companies then adopted a general rider, which embraced substantially all the provisions of the New York form. But the legislature of 1897 [Laws 1897, c. 254], amending section 53, c. 175, p. 417, Laws 1895, in express terms prohibited the making of any changes except such as were specifically enumerated in the statute. The conclusion is inevitable that the legislature intended to deprive the parties of the right to make insurance contracts in any form except as prescribed by the statute."—Elliott, J., in Wild Rice Lumber Co. v. Royal Ins. Co., 99 Minn. 190, 193, 108 N. W. 871 (1906).

SECTION 3.—DELIVERY

NEW YORK LIFE INS. CO. v. BABCOCK.

(Supreme Court of Georgia, 1898. 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Action by Adelaide A. Babcock against the New York Life Insurance Company. Plaintiff had judgment, and defendant brings error. Affirmed.

LEWIS, J. This was a suit upon a policy of life insurance. The case was submitted to the court, without a jury, upon an agreed statement of facts, the substance of which was as follows:

On November 20, 1895, H. C. Babcock made application to J. D. Thomas, local agent at Dalton, Ga., of the defendant company, for insurance of $5,000. On the same day, Babcock paid the agent the first year's premium on said policy, to wit, $174,

See, also, Quinlan v. Insurance Co., 133 N. Y. 356, 365, 31 N. E. 31, 28 Am. St. Rep. 645 (1892).

The rule that the terms of the policy are to be construed favorably to the insured is applied to the standard policy, notwithstanding the fact that its language is fixed by law. Gazzam v. German Union Ins. Co., 155 N. C. 330, 71 S. E. 434, Ann. Cas. 1912C, 362 (1911). See Vance on Ins. 430.

CONSTRUCTION OF POLICY VARYING FROM STANDARD FORM.—"It is urged by the plaintiffs that, this policy being different from the standard prescribed by our statutes and the difference not being indicated thereon as required by law, the differences are null and void and the policy is to be construed as though it were conformable to the standard; and in support of that proposition they have cited cases like Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 24 N. E. 1072, in which it is held that, where a statute provides a certain rule for the interpretation of a policy, the statute must be regarded as incorporated in the policy issued when the law is in force, and, being so incorporated, must prevail over such other provisions as are inconsistent with it. But such cases are not applicable here. The statute in force when this policy was issued did not provide how the policy should be interpreted. It provided, it is true, a standard form, stated in what way and to what extent the form might be modified, declared that no company should issue a different policy and that if it did it should be subject to a fine, but also declared that the policy should be binding upon the company. St. 1894, c. 522, §§ 60, 105. It does not provide any rule of interpretation of a policy issued contrary to law, nor does it say that the policy shall be void. On the contrary, it fines the company for issuing the policy and declares it to be binding upon the company. Its legal effect is not changed. The illegal policy is not changed by law, so as to conform to the legal standard. The insured may sue upon it, but it must be construed as it reads. No statute is incorporated in it. The penalty suffered by the company is a fine, and not a liability to be held on a contract different from that made by it. It follows, therefore, that as to this one policy the amount recovered cannot exceed its part of the sum equal to an amount needed to restore the building to its original condition, and in this case judgment should be entered for the defendant. As to the other cases, judgments should be entered for the plaintiffs in accordance with the report."—Hewins v. London Assurance Corporation, 184 Mass. 183, 68 N. E. 62 (1903).

and at the same time said local agent gave to said Babcock a receipt to the effect that this sum of $174 should be held for Babcock on the condition "that if the officers at the home office of the New York Life Insurance Company approve an application made by him this day for an insurance of five thousand dollars, and a policy is issued and delivered to him while living and in good health, said sum shall be applied in payment of the first annual premium on said insurance, provided on or before such delivery he shall first pay any balance of said premium," and "that unless his application is approved, and a policy is issued and delivered to him while living and in good health, and until such first annual premium is paid in full, the New York Life Insurance Company incurs no liability except for the return of said sum on surrender of this receipt." The receipt further stipulated "that no agent has power in behalf of said company to make any contract of insurance or to bind said company by making any promise or making or receiving any representation or information."

The application made at the same time the receipt was given was at once forwarded by the agent to the home office of the company in New York. It was provided in the application "that the company shall incur no liability under this application until it has been received, approved, the policy issued thereon by the company at the home office, and the premium has actually been paid to and accepted by the company or its authorized agent during my lifetime and good health." This application was stamped: "Received November 25th, 1895. Home Office." In the application was this further provision: "That the foregoing application, together with the answers made to the medical examiner in continuation of and forming part of the application, shall be a consideration for and the basis of the contract of the New York Life Insurance Company, under any policy issued under this application." On the 26th day of November, 1895, a policy of insurance to the applicant was issued, in which was contained the exact provisions above quoted from the application; and on the face of this policy were the words: "In witness whereof, the New York Life Insurance Company has, by its duly-authorized officers, signed and delivered this contract, this, the 26th, day of November, 1895,"—signed by the president and secretary of the company.

The above policy was mailed to the local agent of the company at Dalton, Ga. It reached Dalton, and was delivered to the agent, Thomas, by the postmaster, about 2 p. m. on November 30, 1895. Thomas made no effort to deliver the policy to the applicant, Babcock, whose office was about three minutes' walk from the post office, but carried it home with him, his home being about one mile from the post office. The policy remained in this agent's

possession until about 9 o'clock of the morning of December 2, 1895, at which time one Sherry McAuley, whom the agent knew to be an intimate friend of Babcock, called and asked for said policy, stating that he was authorized to receive it. The agent asked if Babcock was sick, and McAuley replied that he was not. After hesitating, the agent delivered the policy to McAuley. After McAuley had received the policy, he then informed Thomas that Babcock was dead; that he was found dead on the afternoon of the day before, in his office, with a pistol wound in his breast. This was the first knowledge the agent had of Babcock's death, and he at once demanded the return of the policy, but McAuley refused to give it up.

The plaintiff, Adelaide A. Babcock, is the party named in the policy as beneficiary, and is the mother of the deceased applicant. Demand was duly made by plaintiff on defendant company for the payment of the policy after the same became due, which demand was refused. No offer to return the money paid by the applicant to the agent Thomas had ever been made to the legal representative of the estate of Babcock until the day of the trial. Babcock, the applicant, died on December 1, 1895, about 4 o'clock in the afternoon, and was in good health up to the time of his death.

After argument had upon the foregoing evidence, the court rendered a judgment for the plaintiff against the defendant for the principal sum sued for, $5,000, besides interest and costs of suit. To this judgment defendant excepted, upon the following grounds: (1) Because the court erred in holding the contract between the parties was consummated without the delivery of the policy, the parties having contracted, as defendant contends, that actual delivery of the policy should be made during life of applicant; (2) because the court erred in holding there was a delivery of the policy under the contract; (3) because the court erred in disregarding the conditional receipt as being a part of the contract, said receipt declaring the policy must be delivered during the lifetime of the applicant; (4) because the court erred in holding the applicant had paid his first premium, the conditional receipt showing, as defendant contends, that there was really no payment, and that there was no intention upon the part of the applicant to pay, or defendant to receive, said money as a premium.

The fundamental question to be determined in the legal construction of all contracts is, what was the real intention of the parties? Where one party makes a proposition to purchase a thing which is unconditionally accepted by the other, the c ntract of purchase becomes complete. There is no reason why the same rule should not be applied when a written application is made for an insurance policy. So long as the application is not acted upon by the insurance company, of course no contract has been

consummated; and, if the applicant should die before the acceptance of his application, the company has incurred no liability. But when the application is accepted, and nothing remains for the applicant to do, the contract becomes complete. Actual delivery of the policy to the insured is not essential to the validity of such a contract, unless expressly made so by its terms. It is true that as to whether or not a policy has been delivered often becomes a material question, for this is usually the most effectual way of proving the acceptance of the application made by the insured. But the contract may be otherwise proven, and, when it is shown to be in writing, it is ordinarily binding upon the company, though there should be no delivery whatever, either actual or constructive, of the policy, and though it should remain in the hands of the company. This principle is settled by the provisions of our statute, which declares: "Such contract [fire insurance], to be binding, must be in writing; but delivery is not necessary if, in other respects, the contract is consummated." Civ. Code, § 2089. By section 2117 of the Civil Code the same principle is made applicable to life insurance. See, also, Cooke, Life Ins. p. 43; 1 Joyce, Ins. § 91. See, also, opinion of Chief Justice Simmons in Alston v. Insurance Co., 100 Ga. 282, 29 S. E. p. 266. We do not mean to say, however, that the insurer and the insured cannot, by their contract, make an actual delivery of the policy essential to its validity. We see no reason why an insurance company cannot stipulate in its agreement to insure that its risk shall not begin until some definite time in the future, or until some specified act has been done.

It is insisted in this case by the plaintiff in error that the receipt given by the local agent to the applicant when the first annual premium was paid constitutes a part of the contract of insurance, and that, by virtue of the terms of this receipt, it was expressly agreed between the parties that the insurance company should incur no liability until its policy had been actually delivered to the applicant. We think it very questionable whether the provision in this receipt in reference to a delivery of the policy forms any part of the contract sued on in this case. It was evidently given to protect the company against any liability in the event the application made to it should be rejected. The agent who gave the receipt had no authority to make any contract of insurance. When the application was passed upon by the duly-authorized officers of the company, they could accept it upon such terms and conditions as they might stipulate. They could have embodied in the final contract the conditions appearing in the receipt, or have waived their right to do so by agreeing to insure the life of the applicant without prescribing the conditions named in the receipt. In the application that was passed upon and accepted by the company no such condition appears. The policy

that was issued was evidence of the acceptance of this application. The one had direct reference to the other, and neither made any reference whatever to any stipulation contained in the receipt. The policy having referred to, and even quoted verbatim the conditions named in the application, and having made no allusion whatever to any other paper, the position, to say the least, is plausible that it was the intention of the company not to make the receipt a part of its contract. But a decision of this question is not necessary under the view we take of this case; for, under the facts in the record, we hold the condition in the receipt as to delivery of the policy was fulfilled. This case is treated just as if the policy never left the hands of the local agent; for the means by which he was induced to part with its possession after the death of the insured cannot strengthen the case of the defendant in error.

The sole defense of the plaintiff in error is based upon the contention that, under its contract, it was to incur no liability until there had been a delivery of the policy to the applicant. Assuming that this condition constitutes a part of the agreement between the parties, it then becomes a material question as to whether or not such delivery was effected before the death of the insured. This is also a question of intention, and must be determined from the facts and circumstances in this case. As a general rule, whenever one parts with the custody and control of anything with the intention at the time that it shall pass into the possession of another, its delivery to such other person has, in contemplation of law, become complete. The mere manual possession of the thing intended to be delivered is a matter of little consequence. Such possession may exist without any legal delivery, and it may not exist when a legal delivery has been effected. For instance, where one has obtained possession of property fraudulently, or without the knowledge or consent of the owner, there is no delivery from the one to the other, the controlling element of intention being absent. On the other hand, where a person parts with dominion and control over a thing, by transmitting it, for example, through the mails, or otherwise, with the intention that it shall pass unconditionally into the hands of another, and in the course of transportation it has become lost, the delivery is, nevertheless, complete in law. The controlling question, then, on this subject of delivery, is not who has the actual possession, but who has the right of possession.

Applying these principles to the facts before us, we think that the delivery of the policy in question to the applicant had, in contemplation of law, been effected before his death. When his application was accepted at the home office in New York, and a policy issued thereon was placed in the mails for the sole purpose of ultimately reaching his hands, the company parted with

its possession and control of the paper. The intention to deliver was complete. The premium money, which it had held up to that time upon a conditional trust, then became its absolute property. It would have been guilty of no breach of trust in appropriating the fund to its own use. For this privilege it thus acquired, there must have been a corresponding benefit accruing to the original owner of the fund; and what he acquired in lieu of his money was an insurance upon his life, and a right to the policy, which evidenced the consummation of the contract. If the delivery was not complete when the policy was mailed, it certainly became so when it reached the hands of the local agent during the lifetime of the applicant, and while he was in good health. Construing this act of the company in transmitting the policy to the agent in the light of this contract, it necessarily follows, in the absence of any proof to the contrary, that the agent received the policy charged with no other duty except to hand it unconditionally to the applicant. If this be true, the possession of the agent was the possession of the applicant; and, while in the hands of the agent, the policy was simply held by him on deposit, or in trust for its real owner. This owner had a right to demand possession of it. Upon refusal, he could have recovered it by an action of trover. Conceding this right, and we cannot see how death can rob the beneficiary of her rights under the contract.

Upon a careful examination of the authorities cited for the plaintiff in error, as well as others bearing upon the subject, we find nothing in conflict with the above views. [The court here discusses the following cases: Kohen v. Association (C. C.) 28 Fed. 705; Misselhorn v. Association (C. C.) 30 Fed. 545; McCully's Adm'r v. Insurance Co., 18 W. Va. 782; Steinle v. Insurance Co., 26 C. C. A. 491, 81 Fed. 489.]

The above authorities we have selected are among the strongest relied upon by the plaintiff in error, and we merely call attention to them to show that they decide no principle in conflict with our ruling in this case. On the other hand, the principle upon which the third headnote is founded is abundantly sustained by authority, as well as reason. In Newark Mach. Co. v. Kenton Ins. Co., 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768, it was held: "When the terms of an executed policy have been unconditionally accepted by the insured, and it has thereafter been treated as in force by the parties, its delivery will be regarded as complete, though it remain in the hands of the insurer's agent." In Insurance Co. v. Thomson, 94 Ky. 253, 22 S. W. 87, it was held that where a policy was forwarded by the company to its agent, and by the latter delivered to a broker, the premium having been paid, the company was liable, though the policy had not been delivered to the applicant, but to his widow after his death. The supreme court of Kentucky in that case based its ruling

upon the ground that the applicant had a right to the possession of the policy. In Insurance Co. v. Hallock, 27 N. J. L. 645, 72 Am. Dec. 379, it was held: "Acceptance of proposition to insure completes contract of insurance, and the policy sent by mail to the agent for delivery cannot be rescinded without the consent of the insured." In the case of Yonge v. Society, 30 Fed. 902, the applicant was taken sick the same day the agent received the policy from the home office. It was held that the policy was binding upon the company from the time it left the home office; if not then, when the agent received it.

In 1 May, Ins. (3d Ed.) § 55, it is declared that, where a policy is made and forwarded to the agent to be delivered to applicant on payment of premium, he is not entitled to the policy without such payment. Such a case, however, says the author, is to be distinguished from those where the party claiming the policy has done everything which is required of him. In the one case the policy is held merely as a deposit, and for delivery; while in the other it is held for payment of the premium. Again, in section 56, the same author says: "The mere manual possession of the policy is of little consequence, whether it be in the hands of the insurers or the insured." In section 60 of the same work it is declared: "To constitute a delivery of the policy, it is not necessary that there should be an actual manual transfer from one party to the other. The agreement upon all the terms, and the issue and transmission to the agent of a policy in accordance therewith, for delivery without conditions, is tantamount to a delivery to the insured. * * * Whether there is a delivery or not is often a question of intention." 1 Joyce, Ins. § 95, declares that nondelivery by reason of the negligence of the company or its agents does not relieve the isurer of liability.

To the same effect are the decisions of this court upon the subject of what constitutes a valid delivery of a deed. The law makes such delivery essential to the conveyance of title to realty. What would constitute a sufficient delivery in law of a deed would be equally sufficient in the case of an insurance policy, even where the contract between the insurer and the insured stipulated that there should be no liability until delivery of its policy. In the one case the parties supply by contract what the law requires in the other. Rushin v. Shields, 11 Ga. 636 (syl. point 5), 56 Am. Dec. 436; Howell v. Lieth, 39 Ga. 180; O'Neal v. Brown, 67 Ga. 707; Ross v. Campbell, 73 Ga. 309, 310.

In any view, then, that we take of this case, whether the receipt given by the local agent to the applicant constitutes a part of the contract of insurance or not, the defendant company was liable. The insured had complied with every condition and had done everything required of him in order to obtain insurance upon his life. The company had unconditionally accepted his application, and issued a policy to be unconditionally delivered to him. That policy was received by its local agent, who, through negligence or in disregard of his obliga-

tions both to his company and to the other contracting party, failed without excuse and without authority to hand the policy to its real owner. In consequence of this failure and negligence, the company contends it is not liable. It thus seeks to take advantage of the wrong of its own agent by virtually pleading his negligence as a defense to this action. The law should be plain in its terms and unmistakable in its meaning before a court should hold that for such a cause an insurance policy was inoperative. As was held by this court in the case of Clay v. Insurance Co., 97 Ga. 44, 25 S. E. 417: "Stipulations and conditions in policies of insurance, like those in all other contracts, are to have a reasonable intendment, and are to be so construed, if possible, as to avoid forfeitures, and to advance the beneficial purposes intended to be accomplished."

Judgment affirmed.[4] All the justices concurring, except COBB, J., absent for providential cause.

SECTION 4.—MUTUAL BENEFIT INSURANCE

REYNOLDS v. SUPREME COUNCIL OF ROYAL ARCANUM.

(Supreme Judicial Court of Massachusetts, Suffolk, 1906. 192 Mass. 150, 78 N. E. 129, 7 L. R. A. [N. S.] 1154, 7 Ann. Cas. 776.)

Bill by one Reynolds against the Supreme Council of the Royal Arcanum. Case reserved for full court. Bill dismissed.

KNOWLTON, C. J. This is a bill in equity to set aside certain changes in the defendant's by-laws which affect the rights of certificate holders. The defendant is a fraternal beneficiary association, organized under the laws of Massachusetts in 1877, and now subject to the provisions of Rev. Laws, c. 119, and the acts in amendment thereof. The plaintiffs are certificate holders, who bring this bill for themselves and in behalf of others. From the time of its organization the defendant issued certificates to members, agreeing to pay to a designated beneficiary a sum not exceeding a certain number of dollars on the death of the member, upon compliance by him with certain conditions therein stated. The by-laws provided that the death benefit should be for a definite amount, and payments of these definite amounts have always been made. The words "not exceeding" are inserted in the certificate to meet the possibility of

[4] The policy may become binding if such is the intention of the parties, though it remains in the possession of the insurer. Xenos v. Wickham, L. R. 2 Eng. & Irish App. Cas. 296 (1867); 1 Cooley's Briefs on Ins. 442 et seq. But it is competent for the insurer to show by parol that a policy actually in possession of the insured was delivered subject to a condition. See Hartford Fire Ins. Co. v. Wilson, 187 U. S. 467, 23 Sup. Ct. 189, 47 L. Ed. 261 (1903).

a single full assessment not being equal to the amount stated. This limitation of the payment to the amount of an assessment, except when there is an emergency fund, was expressly called for by St. 1899, p. 471, c. 442, § 11, which is now found in Rev. Laws, c. 119, § 6.

Until 1898 the assessments paid by members, from which the death benefits were derived, were certain sums dependent upon the age of the member at the time of receiving his certificate, which sums remained the same as the years went by. These sums were paid to meet assessments as members died, and the amount for the first year would equal the cost to the corporation of the insurance of these members. But as the members grew older the risk of their death increased, and as their payments remained constant, and as there was at no time a payment of any surplus beyond the amount required to meet losses, the payments by members of long standing were not nearly enough to equal the cost of their insurance to the corporation. So the only way in which the amounts required to meet losses could be obtained was from the payments made by new members.

In 1898 the by-laws were amended so as largely to increase the payments to be made by all members, and to require the payments monthly. These amendments went into effect on August 1, 1898, and it appears by the agreed facts that no objection thereto has ever been made by any member of the order. These payments, while much larger than those required by the original by-laws, were upon the same relative basis; that is, the increase upon all was in the same proportion, and they were all determined by the age of the member when he received his certificate, and were not to be afterwards changed as a member grew older.

When these amendments were made it was thought that the increase would provide for the future payments called for by the certificates, and that an adequate emergency fund would be created from this income. Under these amendments there was a surplus in 1898 from the excess of receipts above payments amounting to more than $455,000, and afterwards there was annually a steadily diminishing surplus from the same cause to and including the year 1903. In the year 1904 the payments exceeded the receipts, and there was a deficit of $270,540.50.

Prior to the session of the Supreme Council in May, 1905, the executive committee caused mortality tables of the order to be prepared, and made extended investigations and studies with the aid of competent actuaries, to devise some method, through a change of by-laws, which should enable the corporation to meet its obligations to members. The actuaries prepared for them new tables, each the mathematical equivalent of the others, the first being the regular rates, and three others optional alternatives. These were

founded upon the payment by the order of the maximum value of each certificate, and the payment by the member of a rate adequate, without further modification or additional assessment, to pay the certificate at the maturity thereof. It is agreed that "competent actuaries would testify, and the case may be taken as though they had testified, that the old plan of assessments was faulty, according to the assumptions made by the actuaries, and that the order could not meet the maximum face of its certificates under it; that upon their assumptions a change was expedient or necessary; that the plans proposed and adopted were mathematically correct; that if the members paid the amounts fixed in these tables the order could continue to pay the maximum face value of its certificates at their maturity; that such amounts are no higher than necessary for this purpose, and that they fairly and equitably apportion among the members their contributions to the widows' and orphans' benefit fund, taking into consideration their age and risk." "The plaintiffs do not controvert this evidence in this case, but reserve the right to discuss its materiality, the basis and theories upon which it rests, and its application to this case." On January 1, 1905, the members of the corporation were 305,083 in number, and they held benefit certificates amounting to $680,848,000.

Under these conditions the changes recommended by the actuaries were adopted by an amendment of the by-laws by an almost unanimous vote of the members of the Supreme Council, and the question is whether the changes are legal and binding upon the members.

From facts agreed it is plain that a great corporation, managing and controlling important financial interests for hundreds of thousands of families, was conducting its business upon unsound principles, which, if followed without change, would ultimately lead to financial ruin. The first question is, was the change adopted in excess of the defendant's corporate powers, or in violation of the statute governing such corporations? [This question was decided in the negative.]

The objection that the amendments are illegal by reason of the division of the members into classes cannot prevail. There is no objection to a classification of members according to age, and it would be unjust to disregard age in determining the rates that different persons shall pay for death benefits in an association of this kind.

The distinctive features of such organizations remain since the adoption of the amendments as well as before. The fraternal plan, with mutuality and without profit, distinguishes the work of such an association from a commercial enterprise. It is a charitable and benevolent organization, with a limitation of membership to a special class, and a limitation upon the choice of beneficiaries. It is not allowed to employ paid agents in soliciting or procuring busi-

ness, except within very narrow limits prescribed by the statutes. Rev. Laws, c. 119, § 16. Looking to the nature and purposes of fraternal beneficiary corporations, we see nothing in the amendments at variance with the laws. It cannot have been intended that such corporations should be limited to a method of assessment that would be sure to bring about their early dissolution.

Another question is whether the amendments are in violation of the contract rights of members. It is stated in the record that "the agreements between the plaintiff and the defendant concerning assessments and benefits are not contained in any one specific instrument, but are found in the application for membership, the benefit certificate, the laws of Massachusetts constituting the charter and the constitution and laws of the order." If there were no express stipulation in regard to the by-laws in the application for membership or in the certificates, all members of such a corporation would be bound by by-laws regularly made or amended. Durfee v. Old Colony, etc., R. R. Co., 5 Allen, 230, 242; Pain v. Société St. Jean Baptiste, 172 Mass. 319, 52 N. E. 502, 70 Am. St. Rep. 287; Oliver v. Hopkins, 144 Mass. 175, 10 N. E. 776; Spilman v. Supreme Council Home Circle, 157 Mass. 128, 31 N. E. 776; Wright v. Minn. Mutual Life Ins. Co., 193 U. S. 657, 24 Sup. Ct. 549, 48 L. Ed. 832; Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409.

Every member of this corporation, at the time of joining it, enters into an express agreement to "conform to and abide by the constitution, laws, rules and usages of the said council and order, now in force or which may hereafter be adopted by the same." The certificates promise payment only on condition that the member complies "with the laws, rules and regulations now governing the said council and fund, or that may hereafter be enacted by the Supreme Council to govern the said council and fund," etc. Here in the contract is full authority to amend the laws, rules and regulations.

In regard to a similar provision under which a mutual fire insurance company changed its by-laws, so as to increase the assessments upon certain policy holders, the Supreme Court of the United States uses this language: "The liability of members of this institution is of a twofold nature. It results both from an obligation to conform to laws of their own making as members of the body politic and from a particular assumption or declaration which every individual signs on becoming a member. The latter is remarkably comprehensive. 'We will abide by, observe and adhere to the constitution, rules and regulations which are already established or may hereafter be established by a majority of the assured * * * or which are or may hereafter be established by the president and directors of the society.' * * * As to what is contended to be a material alteration in their charter, we consider it merely as a

new arrangement or distribution of their funds, and whether just or unjust, reasonable or unreasonable, beneficial or otherwise, to all concerned, was certainly a mere matter of speculation proper for the consideration of the society and which no individual is at liberty to complain of, as he is bound to consider it as his own individual act. Every member, in fact, stands in the peculiar situation of being party on both sides, insurer and insured. Certainly the general submission which they have signed will cover their liability to submit to this alteration." Korn v. Mutual Assurance Co., 6 Cranch, 192, 3 L. Ed. 195.

This part of the present case is covered in principle by the decisions of this court in Messer v. Grand Lodge, 180 Mass. 321, 62 N. E. 252, and Pain v. Société St. Jean Baptiste, 172 Mass. 319, 52 N. E. 502, 70 Am. St. Rep. 287, in which cases changes similar to those made by the defendant were upheld under like contracts. The same general doctrine has been stated in many cases in other courts. Wright v. Minn. Mutual Life Ins. Co., 193 U. S. 657, 24 Sup. Ct. 549, 48 L. Ed. 832; Fullenwider v. Supreme Council Royal League, 73 Ill. App. 321; s. c., 180 Ill. 621, 54 N. E. 485, 72 Am. St. Rep. 239; Bartram v. Supreme Council Royal Arcanum, 6 Ont. W. R. 404; Gaines v. Supreme Council Royal Arcanum (C. C.) 140 Fed. 978; Fugure v. Society St. Joseph, 46 Vt. 362; Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; Haydel v. Mutual Reserve Fund Life Ass'n, 104 Fed. 718, 44 C. C. A. 169; Gaut v. Same (C. C.) 121 Fed. 403, 409; Richmond v. Supreme Lodge Order of Protection, 100 Mo. App. 8, 71 S. W. 736; Barbot v. Mutual Reserve Fund Life Ass'n, 100 Ga. 681, 28 S. E. 498; Mutual Reserve Fund Life Ass'n v. Taylor, 99 Va. 208, 37 S. E. 854.

There are many cases in which it is held that the amount expressly promised to be paid in a certificate like those issued by the defendant cannot be cut down by an amendment of the by-laws. Newhall v. American Legion of Honor, 181 Mass. 111, 63 N. E. 1; Langan v. Same, 174 N. Y. 266, 66 N. E. 932; American Legion of Honor v. Getz, 112 Fed. 119, 50 C. C. A. 153. But in many of these, as in the case from this court last cited, a distinction is made between the express stipulation of the corporation to pay a certain sum and other provisions relating to the methods of the corporation, and the duties of the certificate holders, which properly may be a subject for regulation by by-laws, even though they affect the rights of the parties under their contract. The assessments to be paid for death benefits in this case are provided for by the by-laws, while the promise in writing to pay a certain sum to a particular person is, as to that person, a matter outside of those corporate rules which may be expected to be changed by an amendment of the by-laws. This promise on one side is set over against the

promise of the member on the other. The promise of the member is to do what may be called for by the by-laws then existing or that may afterwards be adopted. The promise of the corporation is stated expressly, without mention of the by-laws. The member occupies a dual position, as an insurer and the insured. As one of the association agreeing to provide for the payments that may become due to members, he agrees to be subject to the by-laws. As the insured person to whom a particular sum of money is promised, he has a right to stand on the terms of the promise.

That the duties of members prescribed by the by-laws remain subject to modification when a power of amendment is reserved has often been decided. Loeffler v. Modern Woodmen of America, 100 Wis. 79, 75 N. W. 1012; Langnecker v. Grand Lodge A. O. U. W., 111 Wis. 279, 87 N. W. 293, 55 L. R. A. 185, 87 Am. St. Rep. 860; Lawson v. Hewell, 118 Cal. 613, 50 Pac. 763, 49 L. R. A. 400; Gilmore v. Knights of Columbus, 77 Conn. 58, 58 Atl. 223, 107 Am. St. Rep. 17, 1 Ann. Cas. 715; Ellerbe v. Faust, 119 Mo. 653, 25 S. W. 390, 25 L. R. A. 149.

Most of the cases relied on by the plaintiffs, when rightly analyzed, turn on the distinction between an attempted amendment of the by-laws directly affecting the promise to the certificate holder as an insured person, and an amendment affecting his duties as a member of the corporation bound to perform his part in providing means or otherwise as one of the association of insurers. Hale v. Equitable Aid Union, 168 Pa. 377, 31 Atl. 1066; Fargo v. Supreme Tent, 96 App. Div. 491, 89 N. Y. Supp. 65; Weber v. Supreme Tent, 172 N. Y. 490, 65 N. E. 258, 92 Am. St. Rep. 753; Sautter v. Supreme Conclave, 72 N. J. Law, 325, 62 Atl. 529; Tebo v. Royal Arcanum, 89 Minn. 3, 93 N. W. 513; Deuble v. Grand Lodge, 66 App. Div. 323, 72 N. Y. Supp. 755; Deuble v. Grand Lodge, 172 N. Y. 665, 65 N. E. 1116; Beech v. Supreme Tent, 177 N. Y. 100, 69 N. E. 281; Startling v. Royal Templars, 108 Mich. 440, 66 N. W. 340, 62 Am. St. Rep. 709; Peterson v. Gibson, 191 Ill. 365, 61 N. E. 127, 54 L. R. A. 836, 85 Am. St. Rep. 263; Wist v. Grand Lodge, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603; Roberts v. Cohen, 60 App. Div. 259, 70 N. Y. Supp. 57; Roberts v. Grand Lodge, 173 N. Y. 580, 65 N. E. 1122; United Workmen v. Stumpf, 24 Tex. Civ. App. 309, 58 S. W. 840; Hadley v. Woodman, 1 Tenn. Ch. App. 413; Spencer v. Grand Lodge, 53 App. Div. 627, 65 N. Y. Supp. 1146. Other cases cited by the plaintiffs are clearly adverse to the view which we take. See Ebert v. Mutual Ass'n, 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457; Strauss v. Mut. Ass'n, 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699; Benjamin v. Mutual, 146 Cal. 34, 79 Pac. 517.

On principle and on the weight of authority we are of opinion that there is nothing in this contract that prevents the corporation

from amending its by-laws in a reasonable way, to accomplish the purposes for which it was organized, even though the change increases the payments to be made by certificate holders. Such changes necessarily involve some hardship to certain individual members, but the corporation, under the law, should do that which will bring the greatest good to the greatest number. The members who complain of its action are those who have had the benefit of insurance for themselves and their families for many years, at very much less than the cost of their insurance to the corporation. They have had the good fortune to survive, and therefore their contracts have brought them no money, but all the time they have had the stipulated security against the risk of death. If now they are called upon to pay for future insurance no more than its cost to the corporation they ought not to think it unjust.

Bill dismissed.

WRIGHT v. KNIGHTS OF MACCABEES OF THE WORLD.

(Court of Appeals of New York, 1909. 196 N. Y. 391, 89 N. E. 1078, 134 Am. St. Rep. 838, 31 L. R. A. [N. S.] 423.)

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Dennis L. Wright against the Knights of the Maccabees of the World. A judgment dismissing the complaint on the merits was affirmed by the Appellate Division (128 App. Div. 883, 112 N. Y. Supp. 1150), and plaintiff appeals. Reversed.

The defendant is "a mutual, fraternal benefit insurance association," organized under the laws of the state of Michigan, with its principal office in the city of Port Huron in that state, and with branches or subordinate bodies, known as tents, in various places in many states, one of which, located in the city of Watertown, N. Y., is known as Tent No. 418. The plaintiff, a resident of Watertown, became a member of the defendant and of said tent in the month of June, 1897. In January, 1905, he was suspended by the defendant, and the suspension, if lawful, involved the forfeiture of his right to participate either in the benefit fund of the association or in the fraternal privileges of his tent. Claiming that such suspension was in violation of law, he brought this action to procure his reinstatement as a member in good standing, the restoration of his certificate of insurance, and an injunction against the defendant restraining it from changing the contract or the dues and assessments thereunder. The history of the controversy, which has been before the courts for several years, may be found by consulting the case as reported in 48 Misc. Rep. 558, 95 N. Y. Supp. 996; 119 App. Div. 914, 104 N. Y. Supp. 1151; 122 App. Div. 904, 106 N. Y. Supp. 1150;

128 App. Div. 883, 112 N. Y. Supp. 1150. Upon the last trial the Special Term dismissed the complaint on the merits, without costs, and the Appellate Division affirmed; one of the justices dissenting, and one not sitting.

VANN, J. (after stating the facts as above). This appeal was heard on the judgment roll, no case having been made and none of the evidence or exhibits being printed, except as portions of the latter appear in the findings of the trial court. The following facts, found by the court, present the questions that we are called upon to decide: In his application to become a member of the defendant, dated June 9, 1897, the plaintiff stated: "I hereby agree that * * * the laws of the Supreme Tent of the Knights of the Maccabees of the World now in force, or that may hereafter be adopted, shall form the basis of this contract for beneficial membership * * *; that any * * * neglect to pay any assessment which shall be made by the Supreme Tent within the time provided by the laws thereof, or neglect to pay the dues fixed by said laws, in the manner and at the time provided by said laws, or the by-laws of the tent to which I may belong, shall vitiate my benefit certificate and forfeit all payments made thereon. * * * This application and the laws of the Supreme Tent now in force, or that may hereafter be adopted, are made a part of the contract between myself and the Supreme Tent; and I, for myself, and my beneficiary or beneficiaries, agree to conform to and be governed thereby." On the 19th of June, 1897, the defendant issued to the plaintiff a certificate or policy of insurance stating in part as follows: "This certifies that Sir Knight Dennis L. Wright has been regularly admitted as a member of Watertown Tent No. 418, located at Watertown, state of New York, and that in accordance with and under the provisions of the laws of the order he is entitled to all the rights, benefits, and privileges of membership therein, and that at his death one assessment on the membership, not exceeding in amount the sum of $1,000, will be paid as a benefit to Mary Wright * * * provided he shall have in every particular complied with the laws of the order in force or that may hereafter be adopted."

The plaintiff, who at the date of the certificate was of the age of 50 years, complied with the rules of the defendant and paid all dues, assessments, and charges against him until and including the month of December, 1904. According to the laws of the association in force at the time of plaintiff's admission to membership the annual dues were $3 per year, and in January, 1898, with his acquiescence, they were changed to $4 per year, and he thereafter paid at that rate. According to said laws when the plaintiff was admitted each monthly assessment was $1.40, and, as the court found, "it was further agreed that 'he shall pay the same rate of assessment thereafter so long as he remains continually in good standing in the or-

der.'" Provision was made, however, that in case one assessment per month should not be sufficient to pay death and disability claims as they should occur, additional assessments might be made from time to time to pay such claims. At the time the plaintiff joined the defendant the by-laws provided that "any member holding a benefit certificate who shall become totally and permanently disabled from any cause, not the result of his own illegal act, to perform or direct any kind of labor or business, or who shall arrive at the age of seventy years, and who has paid all legal dues and assessments since the date of his initiation to the date of such disability or period in life, shall be relieved from the payment of any further dues or assessments levied under these laws, or the by-laws of the tent of which he is a member, and shall be entitled to receive from the disability fund annually one-tenth part of the sum for which his benefit certificate is issued, provided, however, that the aggregate of such installments received by him shall in no case exceed the sum specified in such certificate."

In July, 1904, the defendant, without the consent of the plaintiff, so amended its by-laws as to provide that "on and after January 1, 1905, all present life benefit members of the association who are then fifty-five years of age, or over * * * shall pay three dollars per month for each $1,000 of life benefits carried." The amendment also provided for a per capita tax of ten cents per month and a "fraternal tax of fifty cents a year," upon every member of the association. Additional assessments at the new rate were authorized to pay death and disability claims whenever the amount of the life benefit fund was not sufficient for the purpose. On January 1, 1905, the plaintiff had passed the age of 55 years. The amended laws further provided that "A life benefit member of the association who shall become totally and permanently disabled by other than his own illegal, reckless, or foolhardy act from performing or directing any and all kinds of labor or business, whether such directing is his customary occupation or not, and he is in good standing in the association at the time of such disability, may receive total and permanent disability benefits, provided that such member shall continue to pay all monthly rates, additional assessments, dues, and fines which he would have been required to pay if such disability had not occurred. * * * A member so disabled may receive from the life benefit fund annually one-tenth part of the amount named in his life benefit certificate, which amount shall be paid in quarterly payments, provided that such installments shall be paid only during the good standing of such member in the association and the aggregate of such installments shall in no case exceed the amount in his life benefit certificate." As the plaintiff declined to pay at the rate as increased by the amendments of 1904, he was suspended, and owing to the suspen-

sion, according to the by-laws, he forfeited absolutely all his rights derived from membership. In January, 1905, he duly tendered to the defendant in due time the sum of $2.40, which included all that he was owing at the old rate of $1.40 per month, and $1 dues for the quarter beginning on the first of the month, but the defendant refused to accept less than $4.10, the amount due according to the new rate.

The court further found that according to the defendant's experience the rate assessed at the time the plaintiff became a member "at twelve assessments per year is not sufficient for its perpetual maintenance and without an additional number of assessments to pay death and disability claims as they occur, it will be compelled to go out of business within eighteen to twenty-five years from September, 1905;" and "that the increase in the rate, or the number of assessments, was necessary for the continued existence of the defendant." The contract between the parties consisted of the application, certificate, and the by-laws in force when the certificate was issued. Seven years after the contract was made the by-laws were changed by the defendant, without the consent of the plaintiff, so as (1) to increase the monthly assessments from $1.40 to $3 and to require a per capita tax of 10 cents per month together with a fraternal tax of 50 cents per annum, the provision for additional assessments being still continued in force; (2) to abolish the right of a member, upon reaching the age of 70 years, to relief from the payment of any further dues or assessments; (3) to abolish the right of a member on reaching that age to receive annually one-tenth of the sum named in his certificate, and (4) to so modify the disability clause as to entitle a member to the benefit of the annual payment of one-tenth, only in case he should continue to pay precisely the same as if he had not become disabled, and even to continue to pay after he had received the full amount called for by his certificate. The question presented for decision is whether the reservation by the defendant of a general power to amend its by-laws, without specifying in what respects, authorized it to amend them in all the particulars above mentioned. In other words, can such an association amend a specific clause under a general power?

The amendments involve not only a substantial increase in the rate of assessment, but also a substantial decrease in the amount of benefits. While the member is now required to pay more than twice as much as before, he is to receive in return materially less than before. He is deprived altogether of the benefit to which he was entitled upon reaching the age of 70 and is deprived of a material part of the benefit to which he was entitled in case of disability. While it was specifically provided that he should "pay at the same rate of assessment thereafter," the rate of assessment is now more than doubled. The benefits were specified and the rate was

specified, and can such a contract of insurance be so amended by the insurer, under a general power, as to take away from the insured without his consent an essential part of what he specifically contracted for? If the defendant had stated in the body of the certificate that it reserved the right to amend by increasing assessments and reducing benefits, the plaintiff would have had notice of what he might expect, but, in that event, it is doubtful whether he would have taken out the insurance, yet the defendant is forced to claim that the contract now has precisely the same meaning and effect as if it had been drawn in that form. The general reservation doubtless authorized the defendant to amend its by-laws so as to cover subjects not therein specifically provided for and even in other respects, which would not essentially impair the contract as made. But the subjects of assessments and benefits were specifically provided for, each being defined in express terms so that the member knew what he was bound to pay and what he was entitled to receive. After he had acted upon those specifications in the contract by paying at the rate provided thereby for seven years, the plan of insurance was changed from term to life, while the assessments were so advanced and the benefits so reduced as to make a new contract of much less value to him than the old.

Much has been written in various jurisdictions upon the subject of amendments to by-laws, but we shall confine our review to our own decisions, which we regard as conclusive in principle. They show determined and consistent progression. More than 30 years ago it was held by this court, in a carefully considered case, that, even when the power to amend is reserved by the charter of a business corporation, a by-law could not be repealed so as to impair rights which had been given and had become vested by virtue of such by-law. Kent v. Quicksilver Mining Co., 78 N. Y. 159, 182. In a later case, brought against the defendant now before us, the act of self-destruction insured against according to the by-laws was held beyond the power of amendment, so as to provide that such an act should not be insured against. Weber v. Supreme Tent of the Knights of Maccabees of the World, 172 N. Y. 490, 65 N. E. 258, 92 Am. St. Rep. 753. In Shipman v. Protected Home Circle, 174 N. Y. 398, 404, 67 N. E. 83, 63 L. R. A. 347, there was no provision in the certificate or by-laws against death by suicide, but acting under a power reserved by express consent an amendment was adopted making the certificate void, in case the insured "died by suicide, felonious or otherwise, sane or insane." The court, speaking through Judge Werner, said: "As the contract was silent upon the subject of self-destruction by the insured while insane, death from that cause was clearly within its terms. Upon the execution of the contract the insured, therefore, acquired a fixed and vested right to insurance covering that risk. No subsequent amendment

of the by-laws could affect that right without the express assent of the insured." Citing the Weber Case.

In another case, against the present defendant, Judge Cullen, speaking for all the judges but one, said: "A reference to the laws of the order informed the plaintiff at the time he joined the order of the character of the disability which entitled him to receive half the amount of the certificate, and there was no provision therein to the effect that the payment was not to be immediate but in annual installments. As said by Judge Gray in Langan v. Supreme Council American Legion of Honor, 174 N. Y. 266, 66 N. E. 932: 'It was beyond the power of the defendant to affect the obligation expressed in the certificate, without the consent of its holder.' The constitution and laws of the defendant constitute a book of over ninety pages and the provision authorizing an amendment of the endowment laws is found not in the endowment laws, but in a brief section of the constitution." After reviewing certain cases he continued: "Under the doctrine of these cases we think that the obligations assumed by the defendant in its certificate of membership should not be impaired by provisions of the constitution and laws of the order to which the attention of the member might never be called, or at least they should not be cut down under the reservation of the power to amend. It is quite easy for fraternal organizations, such as the defendant, if they deem the provisions for benefits to their members tentative only and desire to have them subject to such modifications as the business of the orders may require to express that in the certificate. So, in the present case, if the certificate had provided that the payments therein specified should be subject to such modification as to amount, terms, and conditions of payment and contingencies in which the same were payable as the endowment laws of the order from time to time might provide, the amendments would be applicable to existing members. But I think that nothing less explicit than this appearing in the certificate itself should be effectual for such a purpose." Beach v. Supreme Tent of the Knights of the Maccabees of the World, 177 N. Y. 100, 104, 69 N. E. 281.

We soon had the subject before us again in a case where the application contained a promise similar to that made by the plaintiff in this case "to conform in all respects to the by-laws, rules, and regulations of the association now in force or which may hereafter be adopted;" and the charter provided for the payment to the beneficiary "of such sum as the by-laws of such association may from time to time prescribe." By an amendment of the by-laws an attempt was made to cut down the benefit specified in the certificate. Judge Haight, who had dissented in the Beach Case, wrote for all the judges and held that the case then in hand could not be distinguished from that case. He said: "The opinion in that case re-

ceived the approval of all of the members of this court except myself. I entertained the view that under the contract entered into in that case the right to amend the by-laws was reserved, and the certificate holder, or those for whose interest he procured the same, did not acquire an absolute vested right under existing by-laws, but that they were subject to the reasonable amendments that should thereafter be found necessary and proper. But a contrary view was adopted by my associates, and it, therefore, becomes my duty to submit to the views of the majority." After holding that the two cases were the same in principle, he continued: "It is true that there is a variation in the certificates. In the Maccabees Case the certificate provided for payments to be made in case of total disability. In this case the certificate contains no provision of that character, but I am unable to see that this distinguishes the two cases in principle. In the Maccabees Case the beneficiary would ultimately receive the full amount of his certificate. In this case the beneficiary gets only about one-third of the amount of the certificate. We think that the former case is controlling upon us. * * *" Evans v. Southern Tier Masonic Relief Association, 182 N. Y. 453, 456, 459, 75 N. E. 317.

All these cases, among others, were cited and relied upon in Ayers v. Ancient Order of United Workmen, 188 N. Y. 280, 80 N. E. 1020. In that case power to amend was expressly reserved and an amendment provided that the certificate should become void if the insured should thereafter "enter into the business or occupation of selling, by retail, intoxicating liquor as a beverage." All the judges who sat united in holding the amendment void, in the absence of a reservation of the specific right to so amend the by-laws as to restrict the occupation or business of the insured, upon the ground that it violated a vested right. Among other things it was said: "An amendment of by-laws which form part of a contract is an amendment of the contract itself, and when such a power is reserved in general terms the parties do not mean, as the courts hold, that the contract is subject to change in any essential particular at the election of the one in whose favor the reservation is made. It would be not reasonable and hence not within their contemplation, at least in the absence of stipulations clearly specifying the subjects to be affected, that one party should have the right to make a radical change in the contract, or one that would reduce its pecuniary value to the other. A contract which authorizes one party to change it in any respect that he chooses would in effect be binding upon the other party only and would leave him at the mercy of the former, and we have said that human language is not strong enough to place a person in that situation. Industrial & General Trust, Limited, v. Tod, 180 N. Y. 215, 225, 73 N. E. 7. While the defendant may doubtless so amend its by-laws, for instance, as to

make reasonable changes in the methods of administration the manner of conducting its business and the like, no change can be made which will deprive a member of a substantial right conferred expressly or impliedly by the contract itself. That is beyond the power of the Legislature as well as the association, for the obligation of every contract is protected from state interference by the federal Constitution." See, also, Parish v. New York Produce Exchange, 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149; Langan v. Supreme Council American Legion of Honor, 174 N. Y. 266, 66 N. E. 932; Simons v. American Legion of Honor, 178 N. Y. 263, 70 N. E. 776; Dowdall v. Catholic Mutual Benefit Ass'n (decided herewith), 196 N. Y. 405, 89 N. E. 1075, 31 L. R. A. (N. S.) 417.

These cases establish the rule that benefits cannot be reduced, or new conditions forfeiting the benefits added by an amendment of the by-laws, even when the general right to amend is expressly reserved. They are controlling, therefore, so far as all the amendments now in question are concerned, except that providing for an increase in the rate of assessments. Following the authorities cited we hold that the amendments which assume to cut down the benefits to which the plaintiff became entitled by his contract with the defendant, are void and of no effect. I am, personally, of the opinion that the amendment increasing the rate of assessment is also void, for I can see no difference in principle between reducing benefits and increasing the amount to be paid for benefits. The plaintiff entered into the contract on the faith of the promise by the association that he should "pay at the same rate thereafter so long as he remains continually in good standing in the order," which he had the right to assume and the defendant knew that he would assume, was a covenant not to increase the rate. The certificate states that "he is entitled to all the rights, benefits, and privileges" provided by the laws of the order, which are thus made a part of the certificate. Hence the right to pay at the old rate was one of the rights provided for and that he contracted for. It was a vested right, immune from change by amendment, in the absence of a specific reservation of power to amend in that particular. On the average, such contracts would be impaired by doubling assessments to the same extent as by cutting off one-half of the benefit. The price to be paid by the plaintiff for insurance is as essential a part of his contract as the amount of insurance to be paid to him by the defendant on the maturity of the policy. Whether the one is increased or the other proportionately decreased makes no difference in principle, or in the final result. By either method the pecuniary value of the contract, which is property, would be reduced one-half.

The defendant seeks to sustain its action in increasing the rate of assessment, by invoking the general power to amend and pleading

that the exercise thereof was essential to its existence. The court did not find, as matter of fact or law, that a reduction of benefits was necessary, nor did it find as a fact that an increase in the rate of assessments was necessary, but found that "the increase in the rate, or the number of assessments, was necessary for the continued existence of the defendant." Necessity bears only on the question whether the amendments are reasonable. While they were desirable as a matter of policy, they were not necessary, for the old by-laws gave the defendants power to raise all the money needed for every purpose by simply increasing the number of assessments. It is true that a great increase in this respect might reduce the membership, still that did not make an increase in the rate of assessments necessary, for it cannot be necessary for a corporation to violate its contract in order to preserve its existence. Vought v. Eastern B. & L. Association, 172 N. Y. 508, 518, 65 N. E. 496, 92 Am. St. Rep. 761. Moreover, the existence of the defendant, according to the findings is not now threatened, nor will it be until after the lapse of from 18 to 25 years, and no one can foresee the changes that will take place in the meantime. If the wonderful growth of the defendant as stated by its counsel continues, the danger now apprehended as to what may take place a quarter of a century hence, may wholly disappear before that period expires.

I think that an increase in the rate of assessment falls under the same condemnation of the law as a reduction in the amount of benefits. A judgment requiring the defendant to perform according to the contract as made and not as amended, yet requiring the plaintiff to pay according to the contract as amended and not as made, would contain inconsistent provisions, one of which would necessarily violate the principle upon which the other was founded.

The judgment should be reversed, and a new trial granted, with costs to abide event.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

Judgment reversed, etc.[5]

[5] As to the right of mutual benefit societies to amend their by-laws, so as to change rate and plan of insurance, see 26 Harv. Law Rev. 180, 17 Id. 127; 1 Cooley's Briefs on Insurance, pp. 703–720.

CHAPTER IV

CONCEALMENT

SECTION 1.—GENERAL PRINCIPLES

OF FRAUD IN POLICIES.

Park on Insurance (3d Ed., 1796) 174: "In treating of those causes, which make policies void from the beginning, or in other words, which absolutely annul the contract, it will be proper in the first place to consider, how far it will be affected by any degree of fraud. In every contract between man and man, openness and sincerity are indispensably necessary to give it its due operation; because, fraud and cunning once introduced, suspicion soon follows, and all confidence and good faith are at an end. No contract can be good unless it be equal; that is, neither side must have an advantage by any means, of which the other is not aware. This being admitted of contracts in general, it holds with double force in those of insurance; because the underwriter computes his risk entirely from the account given by the person insured, and therefore it is absolutely necessary to the justice and validity of the contract, that this account be exact and complete. Accordingly the learned judges of our courts of law, feeling that the very essence of insurance consists in a rigid attention to the purest good faith, and the strictest integrity, have constantly held that it is vacated and annulled by any the least shadow of fraud or undue concealment."

CARTER v. BOEHM.

(Court of King's Bench, 1766. 3 Burr. 1905, 1 Bl. 593, 97 Eng. Repr. 1162.)

This was an insurance-cause, upon a policy underwritten by Mr. Charles Boehm, of interest, or no interest; without benefit of salvage. The insurance was made by the plaintiff, for the benefit of his brother, Governor George Carter.

It was tried before Lord Mansfield at Guildhall: and a verdict was found for the plaintiff by a special jury of merchants.

On Saturday the 19th of April last, Mr. Recorder Eyre, on behalf of the defendant, moved for a new trial.

His objection was, "That circumstances were not sufficiently disclosed."

A rule was made to shew cause: and copies of letters and depositions were ordered to be left with Lord Mansfield.

N. B. Four other causes depended upon this.

The counsel for the plaintiff, viz. Mr. Morton, Mr. Dunning and Mr. Wallace, shewed cause on Thursday the first of this month. But first,

Lord MANSFIELD reported the evidence—That it was an action on a policy of insurance for one year; viz. from 16th of October 1759 to 16th of October 1760, for the benefit of the Governor of Fort Marlborough, George Carter, against the loss of Fort Marlborough in the island of Sumatra in the East Indies, by its being taken by a foreign enemy. The event happened: the fort was taken, by Count D'Estaigne, within the year.

The first witness was Cawthorne, the policy-broker, who produced the memorandum given by the governor's brother (the plaintiff) to him: and the use made of these instructions was, to shew "That the insurance was made for the benefit of Governor Carter, and to insure him against the taking of the fort by a foreign enemy."

Both sides had been long in chancery: and the chancery-evidence on both sides was read at the trial.

It was objected, on behalf of the defendant, to be a fraud, by concealment of circumstances which ought to have been disclosed; and particularly, the weakness of the fort, and the probability of its being attacked by the French: which concealment was offered to be proved by two letters. The first was a letter from the governor to his brother Roger Carter, his trustee, the plaintiff in this cause: the second was from the governor to the East India Company.

The evidence in reply to this objection consisted of three depositions in chancery, setting forth that the governor had £20,000 in effects; and only insured £10,000: and that he was guilty of no fault in defending the fort.

The first of these depositions was Captain Tryon's: which proved that this was not a fort proper or designed to resist European enemies; but only calculated for defence against the natives of the island of Sumatra; and also that the governor's office is not military, but only mercantile; and that fort Marlborough is only a subordinate factory to fort St. George.

There was no evidence to the contrary. And a verdict was found for the plaintiff, by a special jury.

After his lordship had made his report—

The counsel for the plaintiff proceeded to shew cause against a new trial.[1]

Lord MANSFIELD now delivered the resolution of the court.

This is a motion for a new trial.

[1] The arguments of counsel are here omitted.

In support of it, the counsel for the defendant contend, "That some circumstances in the knowledge of Governor Carter, not having been mentioned at the time the policy was underwrote, amount to a concealment, which ought, in law to avoid the policy."

The counsel for the plaintiff insist, "That the not mentioning these particulars, does not amount to a concealment, which ought, in law, to avoid the policy; either as a fraud; or, as varying the contract."

1st. It may be proper to say something, in general, of concealments which avoid a policy.

2dly. To state particularly the case now under consideration.

3dly. To examine whether the verdict, which finds this policy good although the particulars objected were not mentioned, is well founded.

First. Insurance is a contract upon speculation.

The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.

The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the under-writer is deceived, and the policy is void: because the risque run is really different from the risque understood and intended to be run, at the time of the agreement.

The policy would equally be void, against the under-writer, if he concealed; as, if he insured a ship on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium.

The governing principle is applicable to all contracts and dealings.

Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.

But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon. Aliud est celare; aliud, tacere: neque enim id est celare quicquid reticeas; sed cum quod tu scias, id ignorare emolumenti tui causa velis eos, quorum intersit id scire.

This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void, in favour of the party misled by his ignorance of the thing concealed.

There are many matters, as to which the insured may be innocently silent—he need not mention what the under-writer knows—scientia utrinque par pares contrahentes facit.

An under-writer can not insist that the policy is void, because the insured did not tell him what he actually knew; what way soever he came to the knowledge.

The insured need not mention what the under-writer ought to know; what he takes upon himself the knowledge of; or what he waives being informed of.

The under-writer needs not be told what lessens the risque agreed and understood to be run by the express terms of the policy. He needs not be told general topics of speculation: as for instance—the under-writer is bound to know every cause which may occasion natural perils; as, the difficulty of the voyage—the kind of seasons—the probability of lightning, hurricanes, earthquakes &c. He is bound to know every cause which may occasion political perils; from the ruptures of states; from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their councils, or their want of strength &c.

If an under-writer insures private ships of war, by sea and on shore, from ports to ports, and places to places, any where—he needs not be told the secret enterprizes they are destined upon; because he knows some expedition must be in view; and, from the nature of his contract, without being told, he waives the information. If he insures for three years, he needs not be told any circumstance to shew it may be over in two: or if he insures a voyage, with liberty of deviation, he needs not be told what tends to shew there will be no deviation.

Men argue differently, from natural phenomena, and political appearances: they have different capacities, different degrees of knowledge, and different inteliigence. But the means of information and judging are open to both: each professes to act from his own skill and sagacity; and therefore neither needs to communicate to the other.

The reason of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately knows, and the other is ignorant of, and has no reason to suspect.

The question therefore must always be "Whether there was, under all the circumstances at the time the policy was under-written, a fair representation; or a concealment; fraudulent, if designed; or, though not designed, varying materially the object of the policy, and changing the risque understood to be run."

This brings me, in the second place, to state the case now under consideration.

The policy is against the loss of Fort Marlborough, from being destroyed by, taken by, or surrendered unto, any European enemy, between the 1st of October 1759, and 1st of October 1760. It was under-written on the 9th of May 1760.

The under-writer knew at the time, that the policy was to indemnify, to that amount, Roger Carter the Governor of Fort Marlborough, in case the event insured against should happen. The gov-

ernor's instructions for the insurance, bearing date at Fort Marlborough the 22d of September 1759, were laid before the under-writer. Two actions upon this policy were tried before me in the year 1762. The defendants then knew of a letter written to the East India Company, which the company offered to put into my hands; but would not deliver to the parties, because it contained some matters which they did not think proper to be made public.

An objection occurred to me at the trial, "Whether a policy against the loss of Fort Marlborough, for the benefit of the governor, was good;" upon the principle which does not allow a sailor to insure his wages.

But considering that this place, though called a fort, was really but a factory or settlement for trade; and that he though called a governor, was really but a merchant—considering too, that the law allows the captain of a ship to insure goods which he has on board, or his share in the ship, if he be a part-owner; and the captain of a privateer, if he be a part-owner, to insure his share—considering too, that the objection did not lie, upon any ground of justice, in the mouth of the under-writer, who knew him to be the governor, at the time he took the premium. And as, with regard to principles of public convenience, the case so seldom happens, (I never saw one before,) any danger from the example is little to be apprehended—I did not think myself warranted, upon that point, to nonsuit the plaintiff; especially too, as the objection did not come from the bar.

Though this point was mentioned, it was not insisted upon, at the last trial; nor has it been seriously argued, upon this motion, as sufficient, alone, to vacate the policy: and if it had, we are all of opinion "That we are not warranted to say it is void, upon this account."

Upon the plaintiff's obtaining these two verdicts, the underwriters went into a court of equity; where they have had an opportunity to sift every thing to the bottom, to get every discovery from the governor and his brother, and to examine any witnesses who were upon the spot. At last, after the fullest investigation of every kind, the present action came on to be tried at the sittings after last term.

The plaintiff proved, without contradiction, that the place called Bencoolen or Fort Marlborough is a factory or settlement, but no military fort or fortress. That it was not established for a place of arms or defence against the attacks of an European enemy; but merely for the purpose of trade, and of defence against the natives. That the fort was only intended and built with an intent to keep off the country blacks. That the only security against European ships of war, consisted in the difficulty of the entrance and navigation of the river, for want of proper pilots. That the general state and condition of the said fort, and of the strength thereof, was, in general well known by most persons conversant or acquainted with Indian affairs, or the state of the company's factories or settlements; and could not be kept secret or concealed from persons who should en-

deavour by proper inquiry, to inform themselves. That there were no apprehensions or intelligence of any attack by the French, until they attacked Nattal in Feb. 1760. That on the 8th of February 1760, there was no suspicion of any design by the French. That the governor then bought, from the witness, goods to the value of £4000. and had goods to the value of above £20,000. and then dealt for £50,000. and upwards. That on the 1st of April 1760, the fort was attacked by a French man of war of 64 guns and a frigate of 20 guns, under the count d'Estaigne, brought in by Dutch pilots; unavoidably taken; and afterwards delivered to the Dutch; and the prisoners sent to Batavia.

On the part of the defendant—After all the opportunities of inquiry, no evidence was offered, that the French ever had any design upon Fort Marlborough, before the end of March 1760; or that there was the least intelligence or alarm "That they might make the attempt," till the taking of Nattal in the year 1760.

They did not offer to disprove the evidence, that the governor had acted, as in full security, long after the month of September 1759; and had turned his money into goods, so late as the 8th of February 1760. There was no attempt to shew that he had not lost by the capture very considerably beyond the value of the insurance.

But the defendant relied upon a letter, written to the East India Company, bearing date the 16th of September 1759, which was sent to England by the Pitt, captain Wilson, who arrived in May 1760, together with the instructions for insuring; and also a letter bearing date the 22d of September 1759, sent to the plaintiff by the same conveyance, and at the same time, (which letters his lordship repeated.)[2]

They relied too upon the cross-examination of the broker who negotiated the policy, "That, in his opinion, these letters ought to have been shewn, or the contents disclosed; and if they had, the policy would not have been under-written."

The defendant's counsel contended at the trial, as they have done upon this motion, "That the policy was void"—

1st. Because the state and condition of the fort, mentioned in the governor's letter to the East India Company, was not disclosed.

[2] The former of them notifies to the East India Company, That the French had, the preceding year, a design on foot, to attempt taking that settlement by surprise; and that it was very probable they might revive that design. It confesses and represents the weakness of the fort; its being badly supplied with stores, arms and ammunition; and the impracticability of maintaining it (in its then state) against an European enemy.

The latter letter (to his brother) owns that he is "now more afraid than formerly, that the French should attack and take the settlement; for, as they can not muster a force to relieve their friends at the coast, they may, rather than remain idle, pay us a visit. It seems they had such an intention last year." And therefore he desires his brother to get an insurance made upon his stock there.—*Rep.*

2dly. Because he did not disclose, that the French, not being in a condition to relieve their friends upon the coast, were more likely to make an attack upon this settlement, rather than remain idle.

3dly. That he had not disclosed his having received a letter of the 4th of February 1759, from which it seemed that the French had a design to take this settlement, by surprise, the year before.

They also contended, that the opinion of the broker was almost decisive.

The whole was laid before the jury; who found for the plaintiff.

Thirdly—It remains to consider these objections, and to examine "Whether this verdict is well founded."

To this purpose, it is necessary to consider the nature of the contract, at the time it was entered into.

The policy was signed in May 1760. The contingency was, "Whether Fort Marlborough was or would be taken, by an European enemy, between October 1759, and October 1760."

The computation of the risque depended upon the chance, "Whether any European power would attack the place by sea." If they did, it was incapable of resistance.

The under-writer at London, in May 1760, could judge much better of the probability of the contingency, than Governor Carter could at Fort Marlborough, in September 1759. He knew the success of the operations of the war in Europe. He knew what naval force the English and French had sent to the East Indies. He knew, from a comparison of that force, whether the sea was open to any such attempt by the French. He knew, or might know, every thing which was known at Fort Marlborough in September 1759, of the general state of affairs in the East Indies, or the particular condition of Fort Marlborough, by the ship which brought the orders for the insurance. He knew that ship must have brought many letters to the East India Company; and, particularly, from the governor. He knew what probability there was of the Dutch committing or having committed hostilities.

Under these circumstances, and with this knowledge, he insures against the general contingency of the place being attacked by an European power.

If there had been any design on foot, or any enterprize begun, in September 1759, to the knowledge of the governor, it would have varied the risque understood by the under-writer; because, not being told of a particular design or attack then subsisting, he estimated the risque upon the foot of an incertain operation, which might or might not be attempted.

But the governor had no notice of any design subsisting in Sept. 1759. There was no such design, in fact: the attempt was made without premeditation, from the sudden opportunity of a favourable occasion, by the connivance and assistance of the Dutch, which tempted count D'Estaigne to break his parol.

These being the circumstances under which the contract was entered into, we shall be better able to judge of the objections upon the foot of concealment.

The first concealment is, that he did not disclose the condition of the place.

The under-writer knew the insurance was for the governor. He knew the governor must be acquainted with the state of the place. He knew the governor could not disclose it, consistent with his duty. He knew the governor, by insuring, apprehended at least the possibility of an attack. With this knowledge, without asking a question, he under-wrote.

By so doing, he took the knowledge of the state of the place upon himself. It was a matter as to which he might be informed, various ways: it was not a matter within the private knowledge of the governor only.

But, not to rely upon that—The utmost which can be contended is, that the under-writer trusted to the fort being in the condition in which it ought to be: in like manner, as it is taken for granted, that a ship insured is sea-worthy.

What is that condition? all the witnesses agree "That it was only to resist the natives, and not an European force." The policy insures against a total loss; taking for granted "That if the place was attacked, it would be lost."

The contingency therefore which the under-writer has insured against is, "Whether the place would be attacked by an European force;" and not, "Whether it would be able to resist such an attack, if the ships could get up the river."

It was particularly left to the jury, to consider, "Whether this was the contingency in the contemplation of the parties:" they have found that it was.

And we are all of opinion, "That, in this respect, their conclusion is agreeable to the evidence."

In this view, the state and condition of the place was material, only in case of a land-attack by the natives.

The 2d concealment is—His not having disclosed, that, from the French not being able to relieve their friends upon the coast, they might make them a visit.

This is no part of the fact of the case: it is mere speculation of the governor's from the general state of the war. The conjecture was dictated to him from his fears. It is a bold attempt, for the conquered to attack the conqueror, in his own dominions. The practicability of it, in this case, depended upon the English naval force in those seas; which the under-writer could better judge of at London in May 1760, than the governor could at Fort Marlborough in September 1759.

The 3d concealment is—That he did not disclose the letter from Mr. Winch, of the 4th of February 1759, mentioning the design of the French, the year before.

What the letter was; how he mentioned the design, or upon what authority he mentioned it; or by whom the design was supposed to be imagined, does not appear. The defendant has had every opportunity of discovery; and nothing has come out upon it, as to this letter, which he thinks makes for his purpose.

The plaintiff offered to read the account Winch wrote to the East India Company: which was objected to; and therefore not read. The nature of that intelligence therefore is very doubtful. But taking it in the strongest light, it is a report of a design to surprize, the year before; but then dropt.

This is a topic of mere general speculation; which made no part of the fact of the case upon which the insurance was to be made.

It was said—If a man insured a ship, knowing that two privateers were lying in her way, without mentioning that circumstance, it would be a fraud—I agree it. But if he knew that two privateers had been there the year before, it would be no fraud, not to mention that circumstance: because, it does not follow that they will cruise this year at the same time, in the same place: or that they are in a condition to do it. If the circumstance of "this design laid aside" had been mentioned, it would have tended rather to lessen the risque, than increase it: for, the design of a surprize which has transpired, and been laid aside, is less likely to be taken up again; especially, by a vanquished enemy.

The jury considered the nature of the governor's silence, as to these particulars: they thought it innocent; and that omission to mention them did not vary the contract. And we are all of opinion, "That, in this respect, they judged extremely right."

There is a silence, not objected to at the trial nor upon this motion; which might with as much reason have been objected to, as the two last omissions; rather more.

It appears by the governor's[3] letter to the plaintiff, "That he was principally apprehensive of a Dutch war." He certainly had, what he thought, good grounds for this apprehension. Count D'Estaigne being piloted by the Dutch, delivering the fort to the Dutch, and sending the prisoners to Batavia, is a confirmation of those grounds. And probably, the loss of the place was owing to the Dutch. The French could not have got up the river without Dutch pilots; and it is plain, the whole was concerted with them. And yet, at the time of under-writing the policy, there was no intimation about the Dutch.

The reason why the council have not objected to his not disclosing the grounds of this apprehension, is, because it must have arisen from

[3] Dated 22d Sept. 1759. His words are: "And in case of a Dutch war, I would have it [the insurance] done at any rate."—*Rep.*

political speculation, and general intelligence: therefore, they agree, it is not necessary to communicate such things to an under-writer.

Lastly—Great stress was laid upon the opinion of the broker.

But we all think, the jury ought not pay the least regard to it. It is mere opinion; which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause: and therefore it is improper and irrelevant in the mouth of a witness.

There is no imputation upon the governor, as to any intention of fraud. By the same conveyance, which brought his orders to insure, he wrote to the company every thing which he knew or suspected: he desired nothing to be kept a secret, which he wrote either to them or his brother. His subsequent conduct, down to the 8th of February 1760, shewed that he thought the danger very improbable.

The reason of the rule against concealments is, to prevent fraud and encourage good faith.

If the defendant's objections were to prevail, in the present case, the rule would be turned into an instrument of fraud.

The under-writer, here, knowing the governor to be acquainted with the state of the place; knowing that he apprehended danger, and must have some ground for his apprehension; being told nothing of either; signed this policy, without asking a question.

If the objection "That he was not told" is sufficient to vacate it, he took the premium, knowing the policy to be void; in order to gain, if the alternative turned out one way; and to make no satisfaction, if it turned out the other: he drew the governor into a false confidence, "That, if the worst should happen, he had provided against total ruin;" knowing, at the same time, "That the indemnity to which the governor trusted, was void."

There was not a word said to him, of the affairs of India, or the state of the war there, or the condition of Fort Marlborough. If he thought that omission an objection, at the time, he ought not to have signed the policy, with a secret reserve in his own mind to make it void: if he dispensed with the information, and did not think this silence an objection then; he can not take it up now, after the event.

What has often been said of the statute of frauds may, with more propriety, be applied to every rule of law, drawn from principles of natural equity, to prevent fraud—"That it should never be so turned, construed, or used, as to protect, or be a means of fraud."

After the fullest deliberation, we are all clear that the verdict is well founded; and there ought not to be a new trial: consequently, that the rule for that purpose ought to be discharged.

Rule discharged.

SECTION 2.—MARINE INSURANCE

DE COSTA v. SCANDRET.

(Court of Chancery, 1723. 2 P. Wms. 170.)

One having a doubtful account of his ship that was at sea, (viz.) that a ship described like his, was taken, insured her, without giving any information to the insurers of what he had heard, either as to the hazard, or circumstances which might induce him to believe that his ship was in great danger, if not actually lost.

The insurers bring a bill for an injunction, and to be relieved against the insurance as fraudulent.

LORD CHANCELLOR [MACCLESFIELD]. The insured has not dealt fairly with the insurers in this case; he ought to have disclosed to them what intelligence he had of the ship's being in danger, and which might induce him, at least, to fear that it was lost, though he had no certain account of it; for if this had been discovered, it is impossible to think, that the insurers would have insured the ship at so small a præmium as they have done, but either would not have insured at all, or would have insisted on a larger præmium, so that the concealing of this intelligence is a fraud.

Wherefore, decree the policy to be delivered up with costs, but the præmium to be paid back, and allowed out of the costs.

PLANCHÉ et al. v. FLETCHER.

(Court of King's Bench, 1779. 1 Doug. 251.)

The plaintiffs, Planché and Jacquery, merchants in London, insured goods, "on board the Swedish ship called the Maria Magdalena, lost or not lost, at and from London and Ramsgate to Nantz, with liberty to call at Ostend, being a general ship in the port of London for Nantz." There was a declaration in the policy, that the insurance was made on account of "certain persons carrying on trade under the name and firm of Vallée & du Plessis Monsieur Lusseau le Jeune, Guillaume Albert, et Poitier de la Gueule." The defendant underwrote the policy for £300. at three guineas per cent. The ship's clearances from the custom-house in London, and her other papers, were all made out as for Ostend only, but the ship and goods were intended to go directly from London to Nantz, without going to Ostend. Bills of lading, in the French language, dated the 18th of July 1778,

were signed by the captain in London, but purporting to be made at Ostend, and that the goods were shipped there to be delivered at Nantz. The policy was subscribed by the defendant on the 7th of July, and the lading was taken in between the 24th of July and the 17th of August. The proclamation for making reprisals on French ships, &c. bore date the 29th, and appeared in the Gazette on the 31st of July. Two underwriters had signed the policy after the proclamation, at the same premium of three guineas; one on the 31st of July, and the other on the 7th of August. The ship sailed on the 24th of August, and was taken by a King's cutter on her way to Nantz. After her departure from Gravesend, the captain threw overboard all the papers he had received from the custom-house at London. They had been obliterated by the custom-house officers at Gravesend, and were no longer of any use. The ship was released by the Admiralty, but the goods were condemned. The plaintiff had no connection or share in the ship.

Such were the material facts of this case, as they were stated this day, by Lord Mansfield in his report, upon a rule to shew cause why there should not be a new trial. The cause had been tried at the last sittings at Guildhall, and a verdict found for the plaintiffs. The grounds of the application for a new trial were two. 1. That there was a fraud on the underwriters, the ship having been cleared out for Ostend, and yet never having been designed for that place. 2. That, as hostilities were declared after the policy was signed, and before the ship sailed, the defendant ought to have had notice, that he might have exercised his discretion whether he would chuse for a peace premium to run the risk of capture. Besides the facts above-mentioned, his Lordship stated, that the plaintiffs had produced evidence to shew, that all ships going with goods of British manufacture to France clear out for Ostend without meaning to go thither, and that this is universally understood by persons concerned in that branch of commerce. The reason suggested for clearing out for Ostend, and afterwards making bills of lading as from that place, were, that the light-house duties are saved, which are payable when the voyage is known to be directly down the Channel, and that the French duties are less upon goods from Ostend, than from England.[4]

Lord Mansfield. This verdict is impeached upon two grounds. 1. It is said, there was a fraud on the underwriters in clearing out the ship for Ostend when she was never intended to go thither. But I think there was no fraud on them,—perhaps not on any body. What had been practised in this case was proved to be the constant course of the trade, and notoriously so to every

[4] Arguments of counsel are omitted.

body. The reason for clearing for Ostend, and signing bills of lading as from thence, did not fully appear. But it was guessed at. The Fermiers Generaux have the management of the taxes in France. As we have laid a large duty on French goods, the French may have done the same on ours, and it may be the interest of the farmers to connive at the importation of English commodities, and take Ostend duties, rather than stop the trade, by exacting a tax which amounts to a prohibition. But, at any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another. With regard to the evasion of the light-house duties, the ship was not liable to confiscation on that account. 2. The second objection is, that the policy was made before, and the ship sailed after, the proclamation for reprisals. But every man in England and France, on the 17th of July, expected the immediate commencement of a war. I will not say it was actually commenced; but the ambassadors of both countries were recalled; the Pallas and Licorne were taken; the fleets at sea; and, as it appeared afterwards, waiting for each other to fight. It does not appear that the goods were French property; an Englishman might be sending his goods to France in a neutral ship. But it is indifferent whether they were English or French. The risk insured extends to all captures and as two other underwriters signed at the same premium, after the proclamation, it appears that the war risk was in view when the defendant signed. Shall he avail himself of an event which encreases the risk, but which he had in contemplation when he underwrote the policy? I am of opinion that there should not be a new trial.

The rule discharged.[5]

RATCLIFFE v. SHOOLBRED.

(Court of King's Bench, 1780. Park, Ins. [2d Am. Ed.] 181.)

An action was brought on a policy of assurance on goods, on board the Matty and Betty, at and from the coast of Africa to her last discharging port in the British West Indies. The objection made to paying the loss was, that there had been a material concealment, or misrepresentation of the true state or situation of the ship and voyage at the time of underwriting the policy. The ship had been sent out to trade on the coast of Africa, with directions to proceed from thence to the British West Indies, and to stop at Barbadoes, if she could get a sale; if not, to proceed to Montego-Bay. On the 2d of October she sailed from St. Thomas's on the coast of Africa, with a cargo of slaves, and was taken on the 6th of December following by an

[5] See Henkle v. Royal Exchange Assur. Co., 1 Ves. 317 (1749).

American privateer. A letter was received by a house at Liverpool on the 21st of February, mentioning, that the ship was well, and had sailed from St. Thomas's on the 2d of October. This information was communicated next day to the plaintiffs, who, in consequence of it, wrote the same evening to two different brokers, to get a new insurance on the ship, there having been one before, and another on the cargo, which last was the subject of the present action. In the instructions to the brokers, the plaintiffs say nothing of the ship from the time of her first sailing; but to one of the brokers, they wrote thus: "We should be glad if you would get us £600. more on the ship, as she is rather long; and we think it not prudent to run so large a risk at so critical a time. We expect to hear soon of her." It had afterwards occurred, that the policy might be affected, if intimation was not given of the letter, which had been received. The broker, therefore, by direction of the plaintiffs, added to the instructions: "The above ship was on the coast the 2d of October;" but said nothing of her having sailed from St. Thomas. The policy was dated the 21st of March.

Lord MANSFIELD. The insured is bound to represent to the underwriter all the material circumstances of the ship and voyage. If he do not, though by accident only, or neglect, the underwriters are not liable: à fortiori, if he suppress or misrepresent from fraud. The question is, whether this be one of those cases, which is affected by misrepresentation or concealment? If the plaintiffs concealed any material part of the information they received, it is a fraud; and the insurers are not liable.

The jury found for the defendant agreeably to his lordship's direction.

MAYNE v. WALTER.

(Court of King's Bench, 1785. Park, Ins. [6th Ed.] 263.)

Action on a policy of insurance on a Portuguese ship, at and from Madeira to her port of discharge in Jamaica, with liberty to touch at the Leeward Islands. The defendant underwrote £150. upon it: The ship was captured by a French privateer, and condemned in the court of Admiralty in France, on the ground of having an English supercargo on board. The action was brought to recover this loss from the underwriter, who refused to pay, alleging, that the plaintiff should have disclosed to him, that the supercargo was English. At the trial, a verdict was given for the plaintiff, upon a case reserved for the opinion of the court, and containing in substance the facts just stated.

For the defendant it was insisted, upon the argument, that the agent for the insured ought to have disclosed this fact; and

that it was the more material in this case, because during the present war, an ordinance passed in France, similar to the one made in the last war in 1756, which declares, that no Dutch ship shall be allowed to take on board a supercargo, belonging to any nation at enmity with the court of France: and that if any ship, having such supercargo, be taken, it shall be condemned as lawful prize.

Lord MANSFIELD. It is an oppressive and arbitrary rule, and contrary to the law of nations. If both parties were ignorant of it, the underwriter must run all risks: and if the defendant knew of such an edict, it was his duty to inquire, if such a supercargo were on board. It must be a fraudulent concealment of circumstances, that will vitiate a policy. But it is remarkable, that neither party has said a word respecting the treaties between France and Portugal.

Judgment was accordingly given for the plaintiff.

NEPTUNE INS. CO. v. ROBINSON.

(Court of Appeals of Maryland, 1840. 11 Gill & J. 256.)

Action of assumpsit brought by plaintiff against the defendant upon certain policies of insurance issued by the defendant on the schooner "Wildee," at and from Richmond, Va., to Portland, Me. The plaintiff declared for a total loss, and the defendant pleaded non assumpsit. The case was submitted to the county court on a statement of facts in substance as follows: [6]

The plaintiff, as owner of the schooner, secured from the defendant a policy of insurance on the afternoon of April 20, 1837. The vessel sailed from Richmond on April 16th. On the 17th she was driven by winds and currents upon the rocks and became a total loss by perils of the sea. On the same day the captain addressed to the plaintiff a letter stating that the vessel had run on the rocks but that she did not appear to be injured, although the cargo probably was. This letter was received at the Richmond post office on the afternoon of April 17th. It arrived at the Baltimore post office early in the morning of April 20th, and could have been had at that office as early as 7 o'clock if it had been called for. The plaintiff was a resident of Baltimore, but he was not a merchant and had no regular place of business other than his private residence. His letters were not taken to him by a letter carrier, but were called for by him at the post office in Baltimore or sent for thence by him. On April 19th he called at the post office and then received a letter dated April 14th, wherein the captain stated that the "Wildee" would prob-

[6] The statement of facts is much abbreviated.

ably sail on April 16th or 17th. It was on the basis of this letter that the plaintiff obtained the insurance on April 20th. He did not call again at the post office between April 19th and April 24th, on which latter date he received the letter of April 17th. It is admitted that the information contained in the letter of April 17th, if known to the plaintiff, would have been material to the risk. If the court shall, on the facts as stated, be of the opinion that the plaintiff had notice, either actually or constructively, of the loss of the schooner, or the contents of said letter of April 17th, prior to the making of said insurance, or shall be of the opinion that the plaintiff was guilty of such laches in not regularly calling for his letter at the post office and receiving the intelligence of the loss communicated by said letter, as will vitiate said insurance, then and in either case their judgment must be for the defendant; otherwise for the plaintiff.

The county court on this statement rendered judgment for the plaintiff, and the insurance company appealed to this court.

CHAMBERS, J., delivered the opinion of the court.

The claim of the appellee upon this policy of insurance, has been resisted on the ground, that under the circumstances of this case, he is to be charged with notice of the loss prior to the insurance, or at least with such neglect as will vitiate the policy. That the contents or existence of the letter of the 17th April, were known to him in fact, is not alleged in the statement of facts, nor could it by any just inference be deduced therefrom, if indeed, the court could make inferences of fact, which is certainly not the case. The statement in reference to this matter is, that the appellee, on the 19th of April, applied at the post office, (where his letters remained till he called for them,) and received the letter of 14th of April, and on the following day, the 20th, effected the insurance; and that he did not call again at the post office, until 24th April, when he received the letter of 17th, informing him of the loss. It being then conceded, that the facts stated do not prove actual knowledge of the letter of 17th of April, and consequently of the loss of the schooner, we are to decide whether they make a case, from which the law will impute the consequences of knowledge, and imply concealment, suppression or negligence, on the part of the assured to vitiate the policy.

The principles advanced on the part of the appellant, on the authorities cited, may all be admitted, and yet we do not think they will furnish an affirmative answer to this question. That the assured acted with entire good faith, and without any design to impose upon himself a condition of ignorance, the facts afford sufficient evidence to prove. It is very true, that in many instances negligence will be visited with the same penalty, as wilful design to do wrong. Thus, if a party, with knowledge that his agent is in treaty for insurance, obtains information of a

material fact, he is bound promptly to use the means of communicating it. The impossibility of fixing a definite limit, between prompt attention and unreasonable delay, and the difficulty of certainly ascertaining the motives and excuses, for all intervening grades of despatch, in performing an admitted duty, make such a rule imperatively necessary. When the principles of fair dealing, as well as the rules of law, require a fact to be communicated, if known, and time enough had elapsed within which to communicate it, and a means of conveying it had presented, it would be fatal to the rights of the party to require him to prove bad motives for the delay. Justice requires the same standard in this respect for the man of active industry as for the habitually indolent, and wisely says, what a man is thus obliged to do, he must do promptly, and diligently, or bear the consequences of his neglect.

But we do not think the case before us is one where the party has neglected a duty. He was under no obligation to go to the post office, nor had he, as far as the facts are disclosed, any cause to expect information. In point of fact, it was solely in consequence of the loss of the schooner that the captain did write.

The principle relied on by the appellant is, that the assured is bound to use all accessible means of information, at the very last instant of time, to ascertain the condition of the property insured. We do not think this principle recognized by any adjudged case, and if carried out to its legitimate, indeed, necessary, results, would embarrass the whole doctrine of insurance, with complicated and endless difficulties.

We approve the opinion expressed by the county court of Baltimore, and affirm the judgment.

Judgment affirmed.

PROUDFOOT v. MONTEFIORE.

(Court of Queen's Bench, 1867. L. R. 2 Q. B. 511.)

Cockburn, C. J. This was an action against the defendant, as chairman of the Alliance Marine Insurance Company, for the recovery of damages from the company in respect of the company not having delivered to the plaintiff a policy of insurance on certain goods shipped on board a vessel called the Anne Duncan, pursuant to an agreement alleged by the plaintiff to have been entered into between him and the company, and in respect of the company not having paid the sum of money which the plaintiff alleges would have become due on such policy if the same had been so delivered.

The agreement was for insurance on a cargo of madder, lost or not lost, shipped at Smyrna, on a voyage from Smyrna to Liverpool, on

board the ship Anne Duncan, for and on account of the plaintiff, and consigned to him by one T. B. Rees, of Smyrna.

The plaintiff, a merchant at Manchester and Liverpool, dealt largely in madders in the Smyrna market, and Rees, being resident at Smyrna, was employed by him at a salary of £800 a year to make purchases of madder on his account, and to ship and consign the cargoes to him. The cargo in question was purchased and shipped by Rees in the course of his employment as such agent. The ship, with the cargo on board, sailed from Smyrna on the 21st of January, 1861, but again brought up in the Gulf of Smyrna on the same day. She set sail again on the 23rd, but was stranded in the course of that day, and became a wreck. The cargo became a total loss. Intelligence of the stranding of the ship was communicated to Rees on the morning of the 24th. On the 26th, which was the first post day, he communicated by letter to the plaintiff the loss of the vessel; and the fact that though the cargo had been got out, yet as the vessel had had 12 feet of water in the hold, the greater part of the cargo would be seriously damaged.

Having communicated this information, the letter proceeds thus: "I hope to goodness you are fully insured. On the 12th instant I forwarded you invoice and weights of the shipment by her, which gave you plenty of time to effect insurance. Lloyd's agents have telegraphed the disaster, which will reach London before my letter of the 19th instant, inclosing bill of lading.[7] I did not dare telegraph to you, for when once you had the intelligence in hand you were prevented from insuring." On the 31st of January the plaintiff, after receipt of the letters from Rees of the 12th and 19th of January, but prior to the receipt of that of the 26th, gave instructions to effect the policy, and the slip was signed on the same day by the company's agent at Manchester.

There was, therefore, no fraud or undue concealment by the plaintiff of a material fact within his personal knowledge. On the other hand, it is clear that the fact of the loss of the vessel and damage to the cargo might have been communicated to him by Rees by means of the telegraph, but was purposely kept back by the agent for the fraudulent purpose of enabling the plaintiff to insure. We think it clear, looking to the position of Rees as agent to purchase and ship the cargo for the plaintiff, that it was his duty to communicate to his principal the disaster which had happened to the cargo; and, looking to the now general use of the electric telegraph, in matters of mercantile interest, between agents and their employers, we think it was the duty of the agent to communicate with his employers by this speedier means of communication. From the letter of the agent it appears that but for the fraudulent motive for his silence, he would, in the

[7] The telegram was received, and the loss published in Lloyd's List of the 29th of January; but neither the plaintiff nor the company's agent was aware of it.

ordinary course of his duty, have conveyed the intelligence of the loss to his employer, and would have availed himself of the telegraph for that purpose.

Upon the above facts, the question arises whether the plaintiff, the assured, is so far affected by the knowledge of his agent of the loss of the vessel and damage to the cargo as that the fraud thus committed on the underwriter, through the intentional concealment of the agent, though innocently committed so far as the plaintiff is concerned, will afford a defence to the underwriter on a claim to enforce the policy.

Two cases decided in this court, one in the time of Lord Mansfield, the other in that of Lord Ellenborough, established the affirmative of this proposition. In the case of Fitzherbert v. Mather, 1 Term R. 12, 16, where an agent of the assured was employed to ship a cargo of oats, and to communicate the shipment to another agent who was employed to effect an assurance, an omission on the part of the former, who had written to announce the sailing of the ship, on the ship having afterwards got on shore, to communicate that fact, which he might have done by the same post, was held fatal to the insurance. Ashurst, J., observes: "On general principles of policy, the act of the agent ought to bind the principal; because it must be taken for granted that the principal knows whatever the agent knows. And there is no hardship on the plaintiff; for if the fact had been known the policy could not have been effected." Buller, J., says: "Though the plaintiff be innocent, yet if he built his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer. It is the common question every day at Guildhall, when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit. Here it appears that the plaintiff trusted Thomas (the agent), and he must therefore take the consequences."

In the case of Gladstone v. King, 1 Maule & S. 35, 38, which was an action on a policy on a ship, "lost or not lost," the master had omitted to communicate, when writing to his owners, the fact of the ship having been driven on a rock, a fact as to which, on arriving at the port of discharge, he made a protest, detailing the accident, and stating that the ship's bottom must have been chafed; and the owners, in ignorance of the accident, had effected an insurance. On these facts it was held that the captain was bound to communicate the fact, and, for want of such communication, the antecedent damage was an implied exception from the insurance, and the plaintiffs could not recover the loss arising from the repairs rendered necessary by the accident. "If," says Lord Ellenborough, "the captain might be permitted to wink at these circumstances without hazard to the owners, the latter would in all such cases instruct their captain to remain silent; by which means the underwriter at the time of subscribing the policy would incur a certainty of being liable for an antecedent aver-

age loss. To prevent such a consequence, and considering that what is known to the agent is impliedly known to the principal, and that the captain knew, and might have actually communicated to the plaintiffs, the cause of damage, so as to have apprised them of it before the time of effecting the policy, I think that no mischief will ensue from holding in this case that the antecedent damage was an implied exception out of the policy. If the principle be new, it is consistent with justice and convenience; and there being no fraud imputed to the captain in the concealment will not alter the case."

An eminent authority, the late Mr. Justice Story, has, however, declined to be bound by these decisions. In a case (Ruggles v. General Interest Insurance Co., 4 Mason, 74, Fed. Cas. No. 12,119) tried before him on a policy of insurance effected after a total loss, where the master had omitted to give intelligence of the loss to his owner, with the fraudulent design of enabling him to make an insurance, and the insurance had been effected by the owner in ignorance of the loss, that learned judge held that, as the owner at the time of procuring the insurance had no knowledge of the loss, but acted with an entire good faith, he was not precluded from recovering, and that the policy was not rendered void by the omission of the master to communicate intelligence of the loss, although such omission was wilful and fraudulent.[8] The case being taken to a court of error (12

[8] Story, J., thus states his reason for so holding:

"The principle contended for is new. If well founded, it must have often occurred. The general silence, therefore, is against it, but not decisive of its merits. Upon what grounds does it stand? Not upon the ground of agency, for the master was not the agent as to the insurance. Not upon the ground of imputed knowledge or fraudulent concealment, for that is excluded by the argument. It must then be upon the ground that the act of the master binds the owner, and that an omission of duty to his owner, by which third persons are prejudiced, destroys the rights of his owner, however innocent he may be. There is certainly no public policy or convenience in such a principle. The owner does not guaranty the fidelity of the master to all the world, or to the insurer in particular. On the contrary, the insurer sometimes insures against the misconduct of the master. In England it is generally so as to barratry, and in some cases as to negligence. For what reason should the law interfere between two innocent persons to change a loss, which, by contract, one has engaged to bear?

"It is said that he who reposes the confidence in such a one should bear the loss. But underwriters, equally with owners, repose confidence in the masters. The master is the agent for all concerned. In case of loss, he acts for all concerned. In the case of an abandonment, he is retroactively the agent of the underwriter, from the time of the loss on which the abandonment is founded. What reason is there why owners, acting innocently, may not insure against bona fide losses, of which the master withholds the knowledge?

"It is said, it may encourage fraud. But this argument supposes too much. Most losses in this age must be public. The first port of arrival brings all out. The crew and officers, and other persons, are not bound to silence. In fact, but few cases of this defence have yet occurred. But suppose it to be so. If there may be frauds, may there not be also ruinous losses to innocent owners? Is it a good public policy to endanger the interests of commerce by new implied warranties? The underwriter can require a warranty, or except the master's acts, or require his negligence to be fatal. This very case shows

Wheat. 408, 6 L. Ed. 674), the latter upheld the decision; not, indeed, on the grounds taken by Mr. Justice Story, but on the very unsatisfactory, and, as we think, untenable ground, that by the total loss of the vessel the master had wholly ceased to be the agent of the owner, and had become the agent of the underwriters. From the language of the judgment, it may be inferred that if the Court had considered that the relation of the master to his owners had not been interrupted by the loss of the vessel, they would not have upheld the decision appealed from.

The ruling of Mr. Justice Story has been discussed by Mr. Duer, in his admirable work on Insurance (volume 2, p. 418), and we think the reasoning of the learned writer fully establishes his conclusion as to the ruling having been erroneous. Notwithstanding the dissent of so eminent a jurist as Mr. Justice Story, we are of opinion that the cases of Fitzherbert v. Mather, 1 Term R. 12, and Gladstone v. King, 1 Maule & S. 35, were well decided; and that if an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void, on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or, in the ordinary course of business, ought to have knowledge; and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact, which ought to have been made known to the underwriter, and through such ignorance fails to disclose it.

It has been said, indeed, that a party desiring to insure is entitled, on paying a corresponding premium, to insure on the terms of receiving compensation in the event of the subject-matter of the insurance being lost at the time of the insurance, and that he ought not to be deprived of the advantage, which he has paid to secure, by the misconduct of his agent. But to this there are two answers: First, that, as we have already pointed out, the implied condition on which the underwriter undertakes to insure—not only that every material fact which is, but also that every fact which ought to be, in the knowledge of the assured, shall be made known to him—is not fulfilled; secondly, as was said by the court in Fitzherbert v. Mather, 1 Term

how difficult it is to conceal the facts even in an obscure place. They were universally known in twenty days, and reported in a loose rumor in twelve days."

R. 12, 16, where a loss must fall on one of two innocent parties through the fraud or negligence of a third, it ought to be borne by the party by whom the person guilty of the fraud or negligence has been trusted or employed.

By thus holding, we shall prevent the tendency to fraudulent concealment on the part of masters of vessels and agents at a distance, in matters on which they ought to communicate information to their principals, as also any tendency on the part of principals to encourage their servants and agents so to act. For these reasons our judgment must be for the defendant.

Judgment for the defendant.

SNOW v. MERCANTILE MUT. INS. CO.

(Commission of Appeals of New York, 1874. 61 N. Y. 160.)

Appeal from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment entered at the circuit.

This action was brought upon a policy of marine insurance. At the trial certain facts were admitted by the parties for the purposes of the action, in substance as follows:

On October 25, 1866, William Fry Angell was the owner of an insurable interest in the ship Sunda, which was then lying in the port of Liverpool, and was perfectly seaworthy. Angell requested his broker in Liverpool (one Gilchrist) to write to the plaintiffs in the city of New York, to effect an insurance on the ship in a marine insurance company. In accordance with this direction, Gilchrist on October 27, 1866, wrote to the plaintiffs requesting them to effect an insurance, describing the ship, and stating that she was loaded for Aden, and that she would probably be out of the channel before the letter was received. This letter was received by the plaintiffs on November 8, 1866, in due course of mail by ocean steamship. On the 9th day of November the plaintiffs effected an insurance for one year from that date with the defendants, for $5,000. On October 29th the ship sailed from Liverpool on a voyage to Aden, and while proceeding to sea was wrecked and lost on the English coast. The loss was known to Angell as early as October 30, 1866. The value of the ship exceeded $5,000. On the 31st day of October Gilchrist, as the agent of Angell, wrote by the first mail to the United States after the loss of the ship the following letter, received by them November 13th, in due course of mail:

"I wrote you on the 27th inst. per Java as per copy annexed, and am sorry now to inform you that said ship was a total loss on Monday, the 29th instant. She was in tow of a steamer with a pilot on board, and when she had reached the Queen's channel struck on the bar, where she remained until low water and then

fell over on her beam ends, and heavy gale coming on at the time with heavy sea, which caused her to become a total wreck. * * * Probably you may hear of this by telegram before you receive my letter, but if you do not and have the insurance effected, I suppose it will be all right, as the owner has nothing more on the ship, and only £1,100 on the freight, as he is a person who never insures much. * * * I do not suppose it is my duty to telegram the loss of said ship, do you? If so, I shall better know how to act in the future. Please inform me on this point. R. S. Gilchrist."

It was further admitted that the city of New York had been ever since and not before July 30, 1866, in telegraphic communication with Liverpool, England, and that the loss of the Sunda could have been communicated by Angell to the plaintiffs on October 13th by telegraph, and that no such communication was made, and that the loss was not known to the defendant until after the issuing of the policy. The only other statement on the subject of the telegraph, admitted by the parties, was in the following words: "The telegraph between said places" (New York and Liverpool) "was, in October and November, 1866, used by merchants and others as a mode of communication whenever, in their judgment, the interest of their business required the necessary expense for that purpose."

A table was offered in evidence showing the statistics of telegraphic traffic. In the months of July, August and September, 1866, under a twenty pounds tariff, the average number of messages per day was twenty-nine. For the next twelve months under a ten pounds tariff, the daily number was sixty-four. As the tariff diminished, the number increased. In some of the months in 1870, under a tariff of thirty shillings, the average number was nearly 500 per day.

The defendant's counsel moved to dismiss the complaint. The motion was denied and the defendant excepted.

The court thereupon directed the jury to find a verdict for the plaintiff. This direction was excepted to by the defendant.

DWIGHT, C. The general rule of law is well settled, that if intelligence of a fact enhancing the risk or of a loss is received after an order has been given for a marine insurance and before the contract is executed, it must be communicated to the underwriters with due diligence, or the order be countermanded. 1 Phillips on Ins., § 561.

The question open to controversy in the above proposition is, the meaning of the expression "due diligence," or "due and reasonable diligence," as found in some of the authorities. It is claimed by the defendant that it means extreme diligence. To support this view a dictum in Andrews v. Marine Ins. Co., 9 Johns. 34, is referred to; also, 2 Duer on Insurance, note 4, p. 530.

In order to determine this question a general view should be taken of the authorities.

The defendant urges that the rules of mortality require that the insured should use the same diligence to prevent the insurance as he would to prevent the payment of the premium if the vessel were safe, citing 2 Duer on Insurance, §§ 13 and 19, p. 410.

This consideration would address itself to us with much force if the question were new and open to be considered on purely theoretical grounds. The law on this subject seems to be easily ascertained from the decisions, and it is incumbent upon us to apply and enforce it as we find it.

One of the earliest cases on this subject is Grieve v. Young, in the Scotch Court of Sessions, reported in Millar on Insurance. On December 10, 1779, Grieve, a merchant in Eyemouth, wrote to his correspondent in Edinburgh to take out an insurance on his ship, which had just sailed, and was then out of danger. As Eyemouth was not a post town, Grieve sent the letter to a place on the London post road, whence it would be sent by post to Edinburgh. It was sent on the evening of the 10th, and arrived at six o'clock, p. m., on the 11th. The insurance was taken at eight o'clock. The ship was in danger on the evening of the 10th, and went to the bottom at ten o'clock of the morning of the 11th. Grieve was aware of all the facts of the case. The court held that it was not incumbent upon him to send by express to Edinburgh to give information of the facts, but only to make use of the mail and post a letter at once, countermanding the order.

This case was approved in Watson v. Delafield, 2 Caines, 224; s. c., 1 Johns. 150; and in the Court of Errors, 2 Johns. 526. It was held in this case that if an insured, having written letters ordering an insurance, learns of a loss he is bound, if practicable, to countermand his order by the same mail.

The Supreme Court of the United States, through Mr. Justice Story, lays down the correct rule upon this subject in the case of McLanahan v. The Universal Ins. Co., 1 Pet. 170, 7 L. Ed. 98, as follows: Where a party orders insurance and afterward receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent by "due and reasonable diligence," to be judged under all the circumstances of each particular case, for the purpose of countermanding the order or laying the circumstances before the underwriters. The "extreme diligence" recognized in Andrews v. Marine Ins. Co. may be reconciled with the views of Justice Story by assuming that, in special cases, extreme care may be requisite to constitute due and reasonable diligence.

The case of Green v. Merchants' Ins. Co., 10 Pick. (Mass.) 402, presents this question in a clear light. The proposition is there laid down that if a person who has directed insurance to be procured at a distant place, on a risk already commenced, receives, be-

fore the contract is made, intelligence of a loss, he is bound to transmit the intelligence by the earliest and most expeditious usual route of mercantile communication, in order that it may be laid before the person requested to underwrite; but the omission to send by an unusual and extraordinary conveyance, although by possibility it might arrive before the policy was effected, will not vitiate the policy. The question whether a particular mode of communication is a usual one is matter of fact, and must in general be found by a jury. Green v. Merchants' Ins. Co., 10 Pick. (Mass.) 402; McLanahan v. Universal Ins. Co., 1 Pet. 186, 7 L. Ed. 98; Byrnes v. Alexander, 1 Brev. (S. C.) 213.

Following these authorities we must hold that the plaintiff was not bound to resort to the telegraph to communicate the loss of the Sunda to the defendant, unless that was at the time a usual means of mercantile communication.

The statement of facts on which the court below acted contains no finding upon this subject. In fact, it seems studiously to avoid any such finding. Had there been a distinct proposition submitted that the telegraph was then a "usual mode of mercantile communication," the plaintiff must clearly have failed to establish a case for recovery. Instead of that the statement is, that the telegraph between said places (Liverpool and New York) was used by merchants and others as a mode of communication whenever, in their judgment, the interests of their business required the necessary expense for that purpose. This is, by no means, equivalent to a statement that it is a "usual" mode of mercantile communication. Nor do the statistics of the traffic help the case. At the time of the disaster the rates were very high between New York and Liverpool, and the telegraph messages were infrequent. All the messages between Valentia and Heart's Content, or in other words, between America and Europe, averaged but twenty-nine per day both ways, or fifteen from Europe to America. This was the entire telegraphic correspondence between the two countries for all forms of business, and for all the requirements of friendship and affection. This average had prevailed for three months. The messages for the last of the three months averaged ten less than for the first. Under this state of facts I can see no reason for finding that the telegraph was at that time a usual means of mercantile communication, within the meaning of the authorities that have been cited.

The case of Proudfoot v. Montefiore, L. R. 2 Q. B. 513, is not opposed to this view. In that case the appellate court, by agreement of counsel, was authorized "to draw inferences of fact as they thought proper." It was held, accordingly, that as the entire telegraph between the places referred to in that case was in "general use" between agents and their employers, it was the duty of the insured to make use of it. That decision is in entire conformity with the principles followed in the case at bar, as it turns upon

the special circumstances presented to the court. It would be followed in this cause if we could be satisfied (as the English court was on the facts submitted to it) that the telegraph between Liverpool and New York was, on October 31, 1866, a usual means of mercantile communication.

The judgment of the court below should be affirmed.[9]

BLACKBURN, LOW & CO. v. VIGORS.

(House of Lords, 1887. L. R. 12 App. Cas. 531.)

Appeal from the Court of Appeal.

The facts are stated in the judgments of Lord Esher, M. R., and Lindley, L. J., 17 Q. B. D. 553. The following outline will suffice for this report:

The appellants having brought an action against the respondent upon a policy of re-insurance subscribed by him for £50., claiming for a total loss by perils of the sea, the substantial defense was that the defendant was induced to subscribe the policy by the wrongful concealment by the plaintiffs and their agents of certain material facts known to the plaintiffs or their agents and unknown to the defendant.

At the trial before Day, J., and a special jury in July, 1885, the following facts were proved or admitted:

The plaintiffs, underwriters and insurance brokers at Glasgow, had underwritten the steamship State of Florida for £1500., the policy having been effected by the usual brokers for the ship, Rose, Murison & Thomson, who were underwriters and insurance brokers in Glasgow. The ship had left New York on the 11th of April 1884 bound for Glasgow where she was due about the 24th or 25th. On the 30th the plaintiffs tried to re-insure through their London brokers, Roxburgh, Currie & Co., but the terms asked were higher than the plaintiffs would give. On the next day, May 1st, the plaintiffs asked Rose, Murison & Thomson to effect a re-insurance for £1500. at fifteen guineas through Rose, Thomson, Young & Co., the London agents of Rose, Murison & Thomson. The latter telegraphed accordingly to Rose, Thomson, Young & Co. After the telegram and before any answer came Murison, a member of the firm of Rose, Murison & Thomson, became aware of certain facts concerning the ship which were material to the risk, but these facts were never communicated to the plaintiffs or to Roxburgh, Currie & Co. After learning these facts Rose, Murison & Thomson received the following answer to their telegram; "Twenty guineas paying freely and market very stiff; likely to advance before day

[9] Lott, Ch. C., and Earl, C., concurred with Dwight, C. The dissenting opinion of Reynolds, C., with whom Gray, C., concurred, is omitted.

is out." This answer they shewed to the plaintiffs, and then sent in the plaintiffs' names the following telegram to Rose, Thomson, Young & Co.: "Pay 20 guineas." The answer to this was sent direct to the plaintiffs, who ultimately re-insured for £800. at 25 guineas through Rose, Thomson, Young & Co. This was not the policy sued on.

On the 2d of May the plaintiffs through Roxburgh, Currie & Co. effected a policy of re-insurance for £700. at 30 guineas lost or not lost. This was the policy sued on. The ship had in fact been lost some days before the plaintiffs tried to re-insure. It was admitted that the plaintiffs and Roxburgh, Currie & Co. acted in good faith throughout.

The jury having been discharged by consent, Day, J., gave judgment for the plaintiffs for the amount claimed.

The Court of Appeal (Lindley and Lopes, L. JJ., Lord Esher, M. R., dissenting) reversed this decision and gave judgment for the defendant.

Against this judgment the plaintiffs appealed.

Lord HALSBURY, L. C. My Lords, in this case the plaintiffs sue upon a policy of marine insurance, and the only question arises upon the state of defence that the defendant was induced to enter into the contract by concealment of material facts by the plaintiffs and their agents.

The facts are not in dispute. Neither the plaintiffs nor the agent through whom the policy was effected had any knowledge of the material fact the concealment or non-disclosure of which is relied on as vitiating the policy; but an agent, who did not effect the policy, at an earlier period received information, admitted to be material, while he was acting as agent to effect an insurance for the plaintiffs, which he did not communicate.

Day, J., before whom the case was decided without a jury, held that this did not affect the validity of the policy. A majority of the Court of Appeal reversed Day, J.'s, judgment, and held that the non-disclosure was fatal to the plaintiffs' claim.

So far as I can understand the judgment of the Court of Appeal, it is intended to lay down a principle that would not, I think, be contested, but it applies that principle to a state of facts to which I think it is inapplicable. Lindley L. J., says, I think correctly: "It is a condition of the contract that there is no misrepresentation or concealment either by the assured or by any one who ought as a matter of business and fair dealing to have stated or disclosed the facts to him or to the underwriter for him." 17 Q. B. D. 578. And Lopes, L. J., after stating the principle upon which the knowledge of the agent is the knowledge of the principal, explains it to mean that the principal is to be as responsible for any knowledge of a material fact acquired by his agent employed to obtain the insurance as if he had acquired it himself. 17 Q. B. D. 579. To the

propositions thus stated I think no objection could be made; but it is obvious that the words in the one judgment "agent employed to obtain the insurance," or in the other judgment the words "the underwriter," import that the particular contract obtained was, in the language of the statement of defense, a policy which the defendant was induced to subscribe by the wrongful concealment by the plaintiffs and their agents of certain facts then known to the plaintiffs or their agents, and unknown to the defendant, and which were material to the risk.

I doubt very much whether the solution of the controversy as to what is the true principle upon which the contract of insurance is avoided by concealment or misrepresentation, whether by considering it fraudulent or as an implied term of the contract, helps one very much in deciding the present case. If one were to adopt in terms the language of Lord Ellenborough in Gladstone v. King, 1 M. & S. 35, I do not think it could justify the judgment of the majority of the Court of Appeal. In that case a policy lost or not lost was effected on the 25th of October. On the previous 25th of July the ship had run upon a rock. On the 5th of August the captain wrote to his owners, the plaintiffs; they received his letter on the 5th of October. Whatever may be said of the logic of that case, which acquitted the captain of all ill intention, but decided upon the ground that otherwise owners might direct their captains to remain silent, and which upon a policy lost or not lost assumes any antecedent damage to have been an implied exception out of the policy, it does not proceed upon any such ground as the Court of Appeal appear to rely on here. Lord Ellenborough says: "No mischief will ensue" (a somewhat strange mode of enunciating a proposition of law) "from holding in this case that the antecedent damage was an implied exception out of the policy. If the principle be new, it is consistent with justice and convenience." Unfortunately his Lordship does not state what is the principle which he apparently admits to be new. I can quite understand that when a man comes for an insurance upon his ship he may be expected to know both the then condition and the history of the ship he seeks to insure. If he takes means not to know, so as to be able to make contracts of insurance without the responsibility of knowledge, this is fraud. But even without fraud, such as I think this would be, the owner of the ship cannot escape the necessity of being acquainted with his ship and its history because he has committed to others,—his captain or his general agent for the management of his shipping business,—the knowledge which the underwriter has a right to assume the owner possesses when he comes to insure his ship.

With respect to agency so limited, I am not disposed to differ with the proposition laid down by Cockburn, C. J., in Proudfoot v. Montefiore, Law Rep. 2 Q. B. 511, 521. A part of the proposition is

"that the insurer is entitled to assume as the basis of the contract between him and the assured that the latter will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have knowledge." I think these last are the cardinal words and contemplate such an agency as I have described above. I am unable however to see that the present case is governed by any such principle.

A broker is employed to effect a particular insurance. While so employed he receives material information—he does not effect the insurance and he does not communicate the information. How is it possible to suggest that the assured could rely upon the communication to the principal of every piece of information acquired by any agent through whom the assured has unsuccessfully endeavoured to procure an insurance? I am unable to accept the criticism by the Master of the Rolls upon the proposition that the knowledge of the agent is the knowledge of the principal. When a person is the agent to know, his knowledge does bind the principal. But in this case I think the agency of the broker had ceased before the policy sued upon was effected. The principal himself and the broker through whom the policy sued on was effected were both admitted to be unacquainted with any material fact which was not disclosed. I cannot but think that the somewhat vague use of the word "agent" leads to confusion. Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal. Other agents may have so limited and narrow an authority both in fact and in the common understanding of their form of employment that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge or intentions of his principal; and whether his acts are the acts of his principal depends upon the specific authority he has received.

In Fitzherbert v. Mather, 1 T. R. 12, the consignor and the shipper of the goods insured was the agent whose knowledge was in question. In Gladstone v. King, 1 M. & S. 35, the master of the ship was the agent; and in Proudfoot v. Montefiore, Law Rep. 2 Q. B. 511, the agent was the accepted representative of the principal, in effect trading and acting for him in Smyrna, the owner himself carrying on business in Manchester. And though the decision in Ruggles v. General Insurance Co., 12 Wheaton, 408, before the Supreme Court of the United States may not be very satisfactory in what they held under the circumstances of that case to be the relation between the captain of the ship and his owners, the principle upon which that case was decided was the supposed termination of the agency between them.

Where the employment of the agent is such that in respect of the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is I

think correct, but it is obvious that that formula can only be applied when the words "agent" and "principal" are limited in their application.

To lay down as an abstract proposition of law that every agent, no matter how limited the scope of his agency, would bind every principal even by his acts, is obviously and upon the facts of it absurd; and yet it is by the fallacious use of the word "agent" that plausibility is given to reasoning which requires the assumption of some such proposition.[10]

What then is the position of the broker in this case, whose knowledge, though not communicated, is held to be that of the principal?

He certainly is not employed to acquire such knowledge, nor can any insurer suppose that he has knowledge in the ordinary course of employment like the captain of a ship, or the owner himself, as to the condition or history of the ship. In this particular case the knowledge was acquired, not because he was the agent of the assured, but, from the accident that he was general agent for another person. The reason why, if he had effected the insurance, his knowledge, unless he communicated it, would have been fatal to the policy, is because his agency was to effect an insurance, and the authority to make the contract drew with it all the necessary powers and responsibilities which are involved in such an employment; but he had no general agency—he had no other authority than the authority to make the particular contract, and his authority ended before the contract sued on was made. When it was made no relation between him and the shipowner existed which made or continued him an agent for whose knowledge his former principal was responsible. There was no material fact known to any agent which was not disclosed at the point of time at which the contract was made; there was no one possessed of knowledge whose duty it was to communicate such knowledge.

For these reasons, I am of opinion that the judgment of the Court of Appeal should be reversed, and the judgment of Day, J., restored; and I move your Lordships accordingly.[11]

[10] See Wilson v. Salamandra Assurance Co., K. B. 88 L. T. 96 (1903), in which it was held that knowledge possessed by an agent of Lloyd's in a distant port is not to be so imputed to an underwriter, who is a member of Lloyd's, as to render void a policy of reinsurance innocently obtained by him.

[11] The concurring opinions of Lord Watson, Lord Fitzgerald, and Lord McNaghten are omitted.

THAMES & MERSEY MARINE INS. CO., Limited, v. GUNFORD SHIP CO., Limited.

(House of Lords, 1911. App. Cas. 529.)

Lord ALVERSTONE, C. J. My Lords, this is an appeal in an action brought in the Scottish Court upon two policies of insurance for £1000. each effected with the appellants, the Thames and Mersey Marine Insurance Company, on behalf of the owners of the sailing ship Gunford. The defenders, the present appellants, resisted payment of the amounts insured on these grounds: (1.) That there was a breach of the warranty of seaworthiness; (2.) on the ground of non-disclosure of material facts—(a) as to the captain of the vessel, (b) as to the other insurances effected in connection with the ship.

The facts material to the above-mentioned points are not in dispute. The Gunford Shipping Company, Limited, was managed by Francis Briggs, by whom all the business of the ship, including the employment of her officers and the effecting of insurances, was transacted.

The captain of the vessel on the voyage in question was A. W. Sember. The Gunford sailed from Hamburg on October 12, 1907, with a full cargo of patent fuel, coke, and thirteen tons of machinery, on a voyage round Cape Horn to Santa Rosalia. In the course of this voyage, upon the incidents of which it is not necessary to dwell, she on December 10, 1907, went ashore near Cape San Roque and became a total loss.

All the policies, both voyage and time, contained a warranty of seaworthiness. The appellants alleged that this warranty was broken, in that the ship was not seaworthy, because Captain Sember, who, as already stated, sailed in charge of her, was not a competent master. Lord Salvesen, the Lord Ordinary, before whom the case was tried in the first instance, came to the conclusion that there was no breach of the warranty of seaworthiness. He found, after considering the evidence on this question, the captain himself being a witness, and after carefully discussing all the incidents of the voyage, that the Gunford was not unseaworthy by reason of the captain's incompetence. Upon this part of the case your Lordships did not call upon the learned counsel for the respondents. There was, in my opinion, ample evidence on which the learned judge could find as he did, that the captain was not incompetent, and the appeal, so far as it is based upon that ground, fails.

Upon the second ground, namely, that there was concealment of material facts in connection with the employment of the captain, there was a great deal of evidence on both sides. The facts relied upon by the appellants were that a period of twenty-two years had elapsed since Captain Sember had last been at sea, he during that time having been engaged as a stevedore; it was further said that his engage-

ment as captain was made without sufficient inquiry, and the circumstances under which he was engaged were such that it was material to the underwriter to be informed of the previous history and experience of the captain. A great many witnesses were called for the appellants, who stated that, in their opinion, it was material to the underwriters that they should be informed of the circumstances connected with the captain's experience above referred to. The matter formed the subject of some correspondence after the vessel had sailed and before the loss. The Lord Ordinary in his judgment came to the conclusion that, under ordinary circumstances, underwriters rely upon the information at their disposal with regard to the competency of masters, that the name of the master is, as a rule, not inserted in the policy, and that it is only on very rare occasions that underwriters make any inquiry as to his name or history, and that they rely on the shipowners to engage a competent master.

There is no doubt that in this case the information at the disposal of the underwriters would not have afforded the necessary information, because Captain Sember was not appointed master of the Gunford until July 19, and the records of information as to masters at the disposal of the underwriters at the date the policies were effected would not have contained his name. I am, however, not prepared to differ from the Lord Ordinary and the Court of Session upon this part of the case. The fact upon which most reliance was placed was that the underwriters were not told that the master had been on shore for twenty-two years; but this fact could not well be stated by itself without further information as to other matters put before Mr. Briggs as to the qualifications of Captain Sember, and, looking to the well-established usage, I concur in the view taken, as appears in the judgments in the Court below, that there was no concealment of any material facts in regard to the captain.

I have now to deal with the remaining point in the case, and that is whether or not there was concealment of material facts by reason of the non-disclosure of the insurances effected upon the ship. Before discussing this matter it is desirable to state briefly the law applicable to the case.

It is, in my opinion, quite unnecessary to do more than refer to the sections of the Marine Insurance Act, 1906. Section 17 is in the following terms: "A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party."

Section 18: "(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract. (2) Ev-

ery circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk. (3) In the absence of inquiry the following circumstances need not be disclosed, namely: (a) Any circumstance which diminishes the risk: (b) any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know; (c) any circumstance as to which information is waived by the insurer; (d) any circumstance which it is superfluous to disclose by reason of any express or implied warranty. (4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact. (5) The term 'circumstance' includes any communication made to, or information received by, the assured."

Section 19: "Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—(a) every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him."

The two policies to which the appeal now under consideration related were dated on August 30 and 31, 1907, but the material date for the purpose of the question under consideration, namely, the date of the initialling of the slip, was on August 3. The policies were effected upon the instructions of Mr. Briggs. The actual amount of freight due under the charter party was £4790., of which one-half, £2395., was paid in advance at Hamburg. The disbursements and other outlay, which had been incurred in order to earn the freight, was stated to amount to £5280. Some portion of this amount would not have created any insurable interest having regard to the provisions of section 16, but in the view I take of this case it is unnecessary to say how much. Moreover, it was conceded that the only source from which these disbursements could be repaid was the freight earned by the ship, which freight was itself insured. The insurances which were effected on behalf of the owners amounted to £29,300., as follows:

Hull, valued at £18,500	£19,000
Freight, valued at £5500	5,500
Master's effects, valued at £200	200
Disbursements, p. p. i. policy	4,600
	£29,300

In addition Mr. Briggs took out, for his own protection, insurances to the amount of £6500., by p. p. i. honour policies, making in all £35,800. The evidence established that the actual value of the property at risk was hull £9000., and freight about £5000., but, as already stated, the underwriters accepted a policy upon which the hull was

valued at £18,500. Assuming that no part of the disbursements should be taken into consideration as being included in the difference between £9000., the actual value of the hull, and £18,500., the insured value of the ship, there was still a double insurance in respect of the alleged disbursements to the extent of £4600. in addition to the £6500. insurances effected by Mr. Briggs.

If the difference between the declared £18,500. and actual £9000. value was represented by any insurable interest in disbursements, the over-insurance or over-valuation would be correspondingly increased.

It was proved in evidence that no dividends had been earned by the ship for about seven years; it was further established that the object of the insurances was to cover debts owing by the company in the event of the loss of the vessel. There was further evidence that the profits which were being earned by the ship could not stand the amount paid in respect of premiums of insurance. All the disbursement policies were valued policies—that is to say, in the event of the ship being lost the full amount would be paid—and it was admitted by Mr. Briggs that it would be a great deal better for the shareholders if they lost their ship under the policies than if they had to realize their ship by sale, unless they got the Spanish Government to buy or a war took place. Even assuming the value of the ship to be taken at £18,500., the total amount at risk did not exceed £23,500. before the moiety of the freight was paid at Hamburg and a little over £21,000. after the vessel left Hamburg. Some distinction was attempted to be made between over-valuation and over-insurance, but, inasmuch as all the policies were valued policies, the question becomes immaterial. There was on the evidence over-valuation to the extent of £11,100., without taking into consideration the difference between the declared value, £18,500., and the actual value, £9000. Apart, then, from evidence in the particular case, it seems to me that the statement of the above facts is sufficient to shew that, looking to the provisions of the Act of 1906, the circumstances above stated were material as being those which would influence the judgment of a prudent insurer in fixing the premium or determining whether he would take the risk.

Before proceeding to examine the evidence bearing upon this part of the case I think it well to consider the grounds upon which judgment has been given for the pursuers in the Court below. Lord Salvesen, in the first instance, left out of view the honour policies; he further held that the pursuers were not concerned with the policies of £6500. taken out by Mr. Briggs, because their manager entered into the contracts for his own behoof and without the authority of the pursuers; and he also held that it is not in accordance with the principles and calculations on which underwriters in practice act that there should be any disclosure with regard to policies covering other risks which the particular underwriter is not asked to accept. The Lord President adopted in terms the reasoning of Lord Salvesen, and

further, in the passage at the end of his judgment, appears also to put out of view the policies which were effected by Mr. Briggs.

Lord Johnston considered that as soon as it was ascertained that the policies in question were valued policies the case was at an end.

I refer to these reasons, because, with the greatest respect for the opinions of the learned judges, they do not seem to me to have sufficiently considered the question of concealment as it arises upon the sections of the statute to which I have called attention, and had not, so far as I can follow their judgments, considered the evidence bearing upon this part of the case.

Before I refer to that evidence I think it well to say that I cannot accept the view that the £6500. honour policies, effected, it is said, by Mr. Briggs for his own protection, can be put out of view on the grounds suggested by the judgments. Mr. Briggs was the managing owner of the ship, the disbursements, in respect of which he was purporting to insure, were moneys due from the ship to him, and in considering whether there was over-valuation or over-insurance (and in this case, as I have pointed out, the terms are synonymous), which ought to have been disclosed to the underwriters, I cannot, having regard to the provisions of section 19, put out of view the £6500. policies effected by Briggs, nor does it, to my mind, make any difference in regard to the duty of disclosure that the policies covering this £6500. and the policies for the £4600., also for disbursements, were honour policies. These policies were void under section 4 of the Act, but they go to swell the sum which would be payable in the event of the ship being lost, and the total amount being upwards of £35,000., whereas the value actually at risk did not exceed £14,000., there was a very large over-valuation which might well make a prudent underwriter hesitate both as to undertaking the risk and consider the premium which he should require before doing so. I am aware of the doubt suggested by the Court of Appeal in Roddick v. Indemnity Mutual Marine Insurance Co. [1895] 2 Q. B. 380, as to whether the effecting of honour policies was a breach of a warranty not to insure; but in my opinion the view taken by Kennedy, J., in that case was correct, and at any rate the point does not affect the question now under consideration.

Dealing now with the evidence in the case, the whole of which I have carefully considered, though, having regard to the terms of the statute and the duty of the assured, I doubt whether a great part of it was relevant or admissible. The practice of underwriters as to accepting any risks or not making inquiries on particular points cannot, in my opinion, affect the duty as defined by statute, and cannot properly be received as evidence of waiver in any particular case. I have, however, come to the conclusion that the evidence as given establishes, beyond any reasonable doubt, that the matters to which I have referred were material to be disclosed. Taking first the evidence of the pursuer, it is to be noted that, although Mr. Lockhart, one of the

principal witnesses for the pursuer, stated that it is not the practice for underwriters now to be informed or to inquire as to what are the current insurances on other interests, such as freights or disbursements, the witness admitted in cross-examination that, had he not known, he would want a satisfactory explanation as to the large amount of the total insurances, and that without explanation he would probably not take the risk. It is to be noted that Mr. Lockhart was well acquainted with all the facts of the case, and knew the reasons which had induced Messrs. Briggs to insure to the extent which they had done. Mr. Dixie, who was the manager to Messrs. Howard Houlder & Co., had done the Gunford's insurance ever since 1893 and knew all the facts, and it was his firm that had effected the policies with the underwriter. Mr. Boyd, also a witness for the pursuers, stated that the value of the hull was far too high; and Mr. Shankland, who stated that the underwriters would not be in the least concerned by other policies for disbursements, does not appear to have given satisfactory answers to the questions put to him in cross-examination. On the other hand, the evidence of Mr. Jervis, Mr. Douglas, and Mr. Lemon seems to me to be entitled to great weight, as well as that of Mr. Swan and Mr. White.

I have referred to this evidence in some detail, I felt it right to consider how far the view which, apart from the evidence, I had formed as to the materiality of the facts not disclosed is borne out by the testimony given in Court, and, speaking for myself, I unhesitatingly come to the conclusion that, both from the point of view of fixing the premium and determining whether he would undertake the risk, the over-valuation was a matter material to be considered by the underwriter. As regards the amount of premium this view is confirmed by the correspondence which passed between the brokers, Howard Houlder & Co. and Francis Briggs & Co., when the insurances were being effected. I will not refer to the letters in detail, but when the brokers were being asked on July 30 to insure £13,000. on hull, £6000. on freight, £6000. on disbursements, and £200. effects they replied: "The market is very difficult for this outward voyage, and, as we have already mentioned to you, we see no possible chance of placing the lines you wish covered on freight and disbursements at anything like a reasonable price; indeed, we would go further and say we do not think there is a market for such amounts at any price."

Your Lordships were informed by counsel for the respondents that this correspondence was not referred to during the arguments in the Courts below. I have only mentioned it because it cannot be said in any way to displace the inference of fact which I have drawn from the evidence which I have quoted.

A distinction was drawn in argument by Mr. Clyde between insurances on hull, or hull and materials, and insurance on ship. For some purposes, I agree, there may be a distinction, but it is wholly immaterial in this case, having regard to the difference between the

valuation of the interests and the amount insured as contrasted with the value actually at risk. In my opinion the appeal should be allowed and judgment given for the defenders on the ground that the policies were void owing to concealment of material facts. * * *[12]

Ordered that the interlocutors appealed from be reversed.

SECTION 3.—FIRE INSURANCE

BUFE v. TURNER.

(Court of Common Pleas, 1815. 6 Taunt. 338.)[13]

This was an action of covenant brought against the directors of the Phœnix Fire Insurance Office, upon a policy of insurance, dated the 25th of July, 1814, effected by the plaintiff on a certain warehouse in Heligoland. The policy referred to a letter of the plaintiff's, of the 11th of July, 1814, containing the instructions for the insurance and certain conditions to the policy annexed, amongst which was, that if any person should insure his buildings or goods, and should cause the same to be described in the policy otherwise than as they really were, so as the same were charged at a lower premium than was therein proposed, such insurance should be of no force, and that persons insured should give in a particular of their losses, signed, and verified upon oath; and if there appeared any fraud, or false swearing, the claimant should forfeit his claim to restitution or payment. The defendants, among several pleas, pleaded, 2dly, that immediately before and at the time of the writing the plaintiff's letter referred to in the declaration, to wit, on the 11th of July, the warehouse in the declaration mentioned, and the merchandizes contained therein, being the premises intended to be insured by the policy, were in imminent peril of being consumed by fire, which the plaintiff at the time of writing the letter very well knew; that the policy was effected upon the representation contained in the letter, but that the plaintiff fraudulently and deceitfully, and with intent to induce the defendants to effect the policy, before and at the time of effecting the same, concealed from the defendants the fact that the premises were in such peril; by reason of which concealment the defendants averred that the policy was void. The plaintiff replied, that at the time of writing his letter, he did not know that the premises were in imminent danger of being consumed by fire, and

[12] The concurring opinions of Lord Loreburn, L. C., Lord Shaw of Dunfermline, and Lord Robson are omitted.

[13] S. c. 2 Marsh. 46.

did not fraudulently and deceitfully, and with intent to induce the defendants to effect the policy, conceal from the defendants the fact that the premises were in such peril. The defendants joined issue on this replication.

The cause was tried at Guildhall, at the sittings after Trinity term, 1815, before Gibbs, C. J. It appeared that the plaintiff was possessed of two warehouses at Heligoland, one of which was separated by only one other building from the workshop of Jasper, a boat-builder, wherein a fire broke out about seven o'clock in the evening of the 11th of July. That fire, however, was apparently extinguished in half an hour, and four persons were employed by the plaintiff, who was a magistrate there, to watch during the night lest the fire should again break out. The plaintiff on the same evening wrote the letter referred to in the declaration to his agent in London, requesting him to effect the insurance against fire for three months, of £400., upon the plaintiff's warehouse, No. 1, situate on the South quarter of the lower town, between the warehouse of Mr. John Leader, to the South, and that of Mr. Nicolaus Peter Krohn, to the North, as also upon the coffee and casks and bags then stored in the same warehouse, value £3500. The mail for England, was to sail that day, and was then closed; but the plaintiff procured the master of the packet-boat to take the letter with him, and put it into the post-office at Cuxhaven, so that the letter left Heligoland, at a late hour on the same night, and it reached England, by the same packet on the 24th, and the plaintiff's agent, on the following day, effected the policy in question. Early on the morning of the 13th, a fire again broke out in the workshop of Jasper, the boat-builder, and consumed the premises insured. The jury acquitted the plaintiff of any fraud or dishonest design, the fire being apparently extinguished when he ordered the insurance, but thought that the circumstance of the fire on the 11th, ought to have been communicated to the defendants, who without this information did not engage on fair grounds with the plaintiff, and for whom, under these circumstances, they gave their verdict.

Lens, Serjt., now moved to set aside the verdict and have a new trial, but THE COURT refused the rule.

WALDEN v. LOUISIANA INS. CO.

(Supreme Court of Louisiana, 1838. 12 La. 134, 32 Am. Dec. 116.)

MARTIN, J., delivered the opinion of the court.[14]

The plaintiff is appellant from a judgment, which rejected his claim for the value of a house, insured by the defendants, and which was destroyed by fire.

[14] The facts are sufficiently stated in the opinion of the court.

The facts of the case are these: a ropewalk, which was so contiguous to the house, that the destruction of the former by fire, must necessarily have involved the latter in the like calamity; it was rumored, that an attempt had been made to set fire to the ropewalk, which induced the plaintiff to insure the house. The defendants resisted his claim, on the ground, that he had not communicated the circumstance, which had excited his alarm and determined him to insure.

It appears to us, the district court did not err. The underwriter has an undoubted right to be informed of every circumstance, which creating or increasing the risk against which insurance is sought, may induce him to decline the insurance, or demand a higher premium. It appears, from the defendant's own confession, that the attempt which had been made, to set on fire a building, which could not have been consumed without materially endangering his house, created in him an alarm, which prompted him to guard against the danger.

It is true, he evidently acted in good faith; for when he called on the defendants for indemnification, he candidly informed them of the circumstance which had alarmed him. His ignorance of his duty cannot protect him against his omission to give information of a material fact, which the defendants had a right to know, in order to establish the proper rate of insurance.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BURRITT v. SARATOGA COUNTY MUT. FIRE INS. CO.

(Supreme Court of New York, 1843. 5 Hill, 188, 40 Am. Dec. 345.)

Assumpsit on a policy of insurance. The judge charged the jury, in relation to the survey or application, that "it did not amount to a warranty; that there must be evidence to the jury (which is disclaimed in this cause), of fraudulent misrepresentation, or fraudulent concealment of facts; that an accidental omission to insert in the application (without fraud) a building within the ten rods did not make void the policy; and that therefore the mere omission to insert the cabinet shop, under the facts of this case, where fraud is disclaimed, did not avoid the policy." The jury found a verdict for the plaintiff, and the defendants now moved for a new trial on a bill of exceptions.[15]

BRONSON, J. In the law of insurance a representation is not a part of the contract, but is collateral to it. An express warranty is always part of the contract, and a reference in the policy to

[15] The statement of facts is abbreviated.

a survey or other paper will not make such paper a part of the contract, so as to change what would otherwise be a mere representation into a warranty. Jefferson Ins. Co. v. Cotheal, 7 Wend. 72, 22 Am. Dec. 567; Snyder v. Farmers' Ins. & Loan Co., 13 Wend. 92, and s. c. in error, 16 Wend. 481, 30 Am. Dec. 118; Delonguemare v. Tradesmen's Ins. Co., 2 Hall, 629; 1 Marsh. Ins. (Condy) 346–350, 451; 1 Phil. Ins. 346, 347 (Ed. of '40). But these cases admit, what no one could well deny, that the policy may so speak of another writing as to make it a part of the contract, although not actually embodied in the policy. And to that effect, see Routedge v. Burrell, 1 H. Black. 254; Worsley v. Wood, 6 T. R. 710; Roberts v. Chenango Mut. Ins. Co., 3 Hill, 501. Now here the policy not only refers to the plaintiff's written application "for a more particular description" of the property insured, but it refers to it *"as forming a part of this policy."* The application was thus, by express words, made part and parcel of the contract, and the two instruments must be read in the same manner as though they had been actually moulded into one.

How then stands the question of warranty? The plaintiff was required by the "conditions of insurance," and by the form of application with which he was furnished, to state the "relative situation [of the store] as to other buildings—distance from each, if less than ten rods." To this he answered by mentioning five buildings as standing within the ten rods. Although he did not in terms say there was no other building within the ten rods, he must have intended that his answer should be received and understood by the company as affirming that fact; and as the answer is to be regarded as parcel of the contract, I find it difficult to resist the conclusion that the plaintiff has *agreed* that there were no other buildings within the ten rods than those mentioned in the application. Men are not at liberty to put a different construction upon their language when the contract is to be enforced, from that in which they intended the words should be received by the other party at the time the contract was made. I am strongly inclined to the opinion that there was a warranty; but there is another feature in the case which renders it unnecessary to settle that question.

In marine insurance the misrepresentation or concealment by the assured of a fact material to the risk will avoid the policy, although no fraud was intended. It is no answer for the assured to say that the error or suppression was the result of mistake, accident, forgetfulness or inadvertence. It is enough that the insurer has been misled, and has thus been induced to enter into a contract which, upon correct and full information, he would either have declined, or would have made upon different terms. Although no fraud was intended by the assured, it is nevertheless

a fraud upon the underwriter, and avoids the policy. Bridges v. Hunter, 1 Maule & Selw. 15; Macdowall v. Fraser, Doug. 260; Fitzherbert v. Mather, 1 T. R. 12; Carter v. Boehm, 3 Burr. 1905; Bufe v. Turner, 6 Taunt. 338; Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535, 20 Am. Dec. 547; New York Bowery Ins. Co. v. New York Fire Ins. Co., 17 Wend. 359; 1 Marsh. Ins. (Condy) 451–453, 465; 1 Phil. Ins. 214, 303. The assured is bound, although no inquiry be made, to disclose every fact within his knowledge which is material to the risk.

But this doctrine cannot be applicable, at least not in its full extent, to policies against fire. If a man is content to insure my house without taking the trouble to inquire of what materials it is constructed, how it is situated in reference to other buildings, or to what uses it is applied, he has no ground for complaint that the hazard proves to be greater than he had anticipated, unless I am chargeable with some misrepresentation concerning the nature or extent of the risk.[16] It is therefore the practice

[16] "But the relation of the parties seems entirely changed, if the insurer asks no information and the insured makes no representations. That is the chief novelty in this question, as hypothetically stated in the bill of exceptions. We think that the governing test on it must be this: It must be presumed that the insurer has in person or by agent in such a case obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him. This rule must not be misapprehended and supposed to rest on a principle different and somewhat ordinary, that insurers are always to be expected to possess some general knowledge of such matters as they deal with, independent of inquiries to the assured. Hazard v. New England Marine Ins. Co., 8 Pet. 582, 8 L. Ed. 1043 (1834). Nor on the position well settled, that the insurer must be presumed to know what is material in the course of any particular trade—its usages at home and abroad, and those transactions which are public, and equally open to the knowledge of both parties. Hazard v. New England Marine Ins. Co., 8 Pet. 557, 8 L. Ed. 1043 (1834); 2 Duer on Ins. 379, 478; 3 Kent's Com. 285, 286; Green v. Merchants' Ins. Co., 10 Pick. (Mass.) 402 (1830); Tidmarsh v. Washington Fire & Marine Ins. Co., 4 Mason, 439, Fed. Cas. No. 14,024 (1827); Buck v. Chesapeake Ins. Co., 1 Pet. 160, 7 L. Ed. 90 (1828). Nor on any special usage proved, as in Long v. Duff, 2 Bos. & Pul. 210 (1800), that it was, in a case like this, the duty of 'the underwriter to obtain this information for himself.'

"But when representations are not asked or given, and with only this general knowledge the insurer chooses to assume the risk, he must in point of law be deemed to do it at his peril. It has been justly remarked, in a case somewhat like this in principle: 'With this knowledge, and without asking a question, the defendant underwrote; and by so doing, he took the knowledge of the state of the place upon himself,' etc. 1 Marshall on Ins. 481, 482; Carter v. Boehm, 3 Burr. 1905 (1766). In cases of fire insurance, also, the underwriters may be considered as more likely to do this than in marine insurance; because the subject insured is usually situated on land and nearer, so as to be examined easier by them or their agents; and the circumstances connected with it are more uniform and better known to all. Jolly's Adm'rs v. Baltimore Equitable Society, 1 Har. & G. (Md.) 295, 18 Am. Dec. 288 (1827); Burrit v. Saratoga County Mut. Fire Ins. Co., 5 Hill, 192, 40 Am. Dec. 345 (1843).

"It is true, that, from what is reasonable and just, some exceptions must exist to this general rule, though none of them are believed to cover the present case. Thus the insurer must be supposed, if no special information has been asked or obtained, to take the risk, on the hypothesis that nothing

of companies which insure against fire to make inquiries of the assured, in some form, concerning all such matters as are deemed material to the risk, or which may affect the amount of premium to be paid. This is sometimes done by the conditions of insurance annexed to the policy, and sometimes by requiring the applicant to state particular facts in a written application for insurance. When thus called upon to speak, he is bound to make a true and full representation concerning all the matters brought to his notice, and any concealment will have the like effect as in the case of a marine risk. See 1 Phil. Ins. 284, 285 (Ed. of 1840). It is not necessary, for the purpose of avoiding the policy, to show that any fraud was intended. It is enough that information material to the risk was required and withheld.

This doctrine is fatal to the present action. The plaintiff was plainly and directly called upon to state the relative situation of the store as to all other buildings within the distance of ten rods; and he omitted to mention several buildings which stood within that distance, and among the number was one which was far more hazardous than that to which the policy applied. If there could be any doubt that the facts concealed were material to the risk, the question should be left to the jury.

But there is a further view of the case which is still more decisive against the action; and it is one in which the materiality of the concealment is not open for discussion. The plaintiff was required by the conditions annexed to the policy, and by the printed form of application which he used, to give the information which he withheld. And it was one of the "conditions of insurance" that if he should "make *any* misrepresentation or *concealment* in the application" the policy should be "void, and of no effect." Nothing is said about fraud; but *any* concealment in the application avoids the policy. And yet the jury was instructed that there must be a *fraudulent* concealment of facts. That position cannot be maintained without making a new contract for the parties.

A warranty by the assured in relation to the existence of a

unusual exists enhancing the risk; and hence, as in this case, if lamps are used in the picking-room, which do enhance it, he must show that their use in the manner practised was unusual or not customary, and then, though no representations had been asked or made, he would make out a case, where it was the duty of the insured to inform him of the fact, and where suppressio veri would be as improper and injurious as suggestio falsi. Livingston v. Maryland Ins. Co., 6 Cranch, 281, 3 L. Ed. 222 (1810). So, if any extrinsic peril existed, outside and near a building insured, and which increased the risk, the insured should communicate that, though not requested. Bufe v. Turner, 6 Taunt. 338 (1815); Walden v. Louisiana Ins. Co., 12 La. 134, 32 Am. Dec. 116 (1838). But as to the ordinary risks connected with the property insured, if no representations whatever are asked or given, the insurer must, as before remarked, be supposed to assume them; and, if he acts without inquiry anywhere concerning them, seems quite as negligent as the insured, who is silent when not requested to speak." * * *—Woodbury, J., in Clark v. Manufacturers' Ins. Co., 8 How. 235, 12 L. Ed. 1061 (1850).

particular fact must be strictly true, or the policy will not take effect; and this is so whether the thing warranted be material to the risk or not. It would, perhaps, be more proper to say, that the parties have agreed on the materiality of the thing warranted, and that the agreement precludes all inquiry on the subject. See the cases already cited, and Fowler v. Ætna Fire Ins. Co., 6 Cow. 673, 16 Am. Dec. 460, and 7 Wend. 270, S. C.; 1 Phil. Ins. 351, 354. Here the parties have by their contract placed a misrepresentation or concealment in relation to particular facts upon the same footing as a warranty. They have agreed that the misrepresentation or concealment shall avoid the policy, and we have nothing to do with the inquiry whether the fact misrepresented or concealed was material to the risk. The jury should have been instructed to find a verdict for the defendants.

The CHIEF JUSTICE and COWEN, J., being members of the company, gave no opinion.

New trial granted.

HARTFORD PROTECTION INS. CO. v. HARMER.

(Supreme Court of Ohio, 1853. 2 Ohio St. 452, 59 Am. Dec. 684.)

RANNEY, J., delivered the opinion of the court:[17]

This suit was brought on two policies of insurance, dated and issued March 13, 1851. By the first, numbered 74, three buildings, situated in Hendrysburg, Belmont county, and a stock of goods in one of them, were insured for one year, from noon of that day; and by the other, numbered 75, a lot of unmanufactured tobacco, stored in one of the buildings, was insured for four months.

Upon trial, in the district court of the county, a verdict was found, and judgment given for defendant in error, upon both policies; to reverse which, this writ is prosecuted. The record presents an unusual number of interesting questions, arising upon exceptions taken to the rulings and opinions of that court, which have been argued here at much length, and with great industry and research, by counsel on both sides. As these questions relate to a contract of great importance and very general use, I shall endeavor to state, as clearly as I may be able to do, the conclusions to which the court has come; founded, as we think, upon settled principles; without attempting to canvass, at length, the wilderness of adjudged cases cited in argument, or the conflicting opinions of jurists and elementary writers; from which, confusion, rather than certainty and precision, has very often resulted. * * *

[17] Only such parts of the opinion as refer to concealment are here printed.

It was proved that one of the buildings insured had, shortly before the risk was taken, been on fire; and at the time was suspected, by the insured, to have been fired by an incendiary. This fact was not communicated to the agent of the company when the policy was issued, and was claimed to have been a material fact, which the insured was bound to have disclosed. * * *

At the hazard of incurring the imputation of prolixity, I have thus stated at length the view of the court below, with the facts to which they were applied, in order that our own may be the more clearly understood. They involve, as will be seen, the doctrines of warranty, misrepresentation, and concealment, as applied in the law of insurance. The consequences of each, in marine insurance, may be regarded as well settled by the great current of authority. Every undertaking of the assured, in the body of the policy, amounting to a warranty, whether material to the risk or not, must be strictly and literally true; and every representation of a *material* fact which might have influenced the judgment of the underwriter, in assuming the risk, must be substantially true. For the same reason, the assured is bound to communicate every material fact within his knowledge, not known, or presumed to be known to the underwriter, whether inquired for or not; and a failure in either particular, although it might have arisen from mistake, accident, or forgetfulness, is attended with the rigorous consequences, that the policy never attaches and is void; for the reason, that the risk assumed is not the one intended to be assumed by the parties. Much of this doctrine is peculiar to this contract. In other contracts, it is enough that warranties even are substantially performed; and they cannot, in general, be impeached for misrepresentation, or concealment, unless fraud was intended.

Fire insurance sprung up at a later period; and the courts finding a system of rules already constructed for marine risks, at once transferred them to this new species of insurance.

Almost all the diversity of opinion to be found in the later cases, has resulted from a growing conviction with most courts, that a substantial difference exists in the nature and essential elements of the contract of marine and fire insurance, which renders some of these rules inapplicable to the latter; and from a disinclination with others, to depart from the strict rules applied to marine insurance. * * *

The charge as to the concealment of the previous fire, is also objected to, because it directed the jury, in determining the materiality of the fact, to inquire for and be governed by the true cause of the fire, and not the belief of Harmer as to the cause. So far as his belief was of any value, as an admission of the true cause, it went to the jury for what it was worth, and the com-

pany had the full benefit of it; and if his belief corresponded with the true cause, of course no injury was done them. If it did not, of what importance was his belief or suspicion to them? Before the duty of disclosure arises, the *fact* must be material to the risk; that is, it must increase the chances of loss. If it was not in truth material, could his erroneous suspicions make it so? It was not pretended that he knew the cause, or had received any information, either true or false, which he failed to communicate. Under such circumstances the marine rule is, that "the assured is not bound to communicate his own expectations, and opinions, and speculations upon facts." 1 Phil. on Ins. 315.

The balance of the instruction upon the subject of concealment, is not complained of; but, although not necessary to the decision of the case, I cannot let it pass without expressing my decided conviction that the law was laid down too favorably to the underwriter, and too strongly against the assured. It is not now true, whatever may be thought of the older authorities, that there is no difference in this respect, between marine and fire insurance; nor that a failure to disclose every fact material to the risk, upon which information is not asked for, or suppressed with a fraudulent intent, will avoid a policy of the latter description. The reason of the rule, and the policy in which it was founded, in its application to marine risks, entirely fail when applied to fire policies. In the former, the subject of insurance is generally beyond the reach, and not open to the inspection of the underwriter, often in distant ports or upon the high seas, and the peculiar perils to which it may be exposed, too numerous to be anticipated or inquired about, known only to the owners and those in their employ; while in the latter, it is, or may be, seen and inspected before the risk is assumed, and its construction, situation and ordinary hazards, as well appreciated by the underwriter as the owner.

In marine insurance, the underwriter, from the very necessities of his undertaking, is obliged to rely upon the assured, and has, therefore, the right to exact a full disclosure of all the facts *known* to him, which may in any way affect the risk to be assumed. But in fire insurance, no such necessity for reliance exists, and if the underwriter assumes the risk without taking the trouble to either examine or inquire, he cannot very well, in the absence of all fraud, complain that it turns out to be greater than he anticipated. And so are the latest and best authorities. Mr. Angell (Ang. on Ins. 209,) says: "The strictness and nicety required in questions arising on policies of marine insurance, are not, to their full extent, applicable to policies of fire insurance; the former being entered into by the underwriter, almost exclusively on the statements and information given by the assured himself; in the latter, the underwriters assume the risk on the knowl-

edge acquired by an actual survey and examination made by themselves, and not on representations coming from the assured." * * *[18]

In Clark v. Manufacturers' Ins. Co., 8 How. 235, 12 L. Ed. 1061, the insurance was upon a cotton factory, and one question was as to the use of lamps in the picker-room. The Supreme Court of the United States held, that "if no representations were made or asked, it would not be the duty of the insured to make known the fact that lamps were used in the picker-room, although the risk might have been thereby increased, unless the use of them in that way was unusual." Justice Woodbury, in delivering the opinion of the court, says: "As to the ordinary risks connected with the property insured, if no representations whatever are asked or given, the insurer must be supposed to assume them; and if he acts without inquiry anywhere concerning them, seems quite as negligent as the insured, who is silent when not requested to speak." And finally, the Court of Appeals in New York, in the case of Gates v. Madison County Mut. Ins. Co., 5 N. Y. 469, 55 Am. Dec. 360, Judge Jewett delivering the opinion, has held, that in the absence of special provisions in the policy relating to the disclosure of facts material to the risk, all that is required of the insured is, *that he shall not misrepresent or designedly conceal any such facts,* and that he answer fully and in good faith, all inquiries addressed to him by the insurer.

This, I confess, seems to me the true rule; perhaps, with the qualification more distinctly indicated by the Supreme Court of the United States, that the insured does not withhold information of such unusual and extraordinary circumstances of peril to the property, as could not, with reasonable diligence, be discovered by the insurer, or reasonably anticipated by him, as a foundation for specific inquiries. As this is not necessary to the decision of the case, I express it but as my own opinion, and I am led to do so, from being now satisfied that I expressed an erroneous opinion at the circuit, by adhering too closely to the doctrine of marine insurance, in a point where the reason of that rule does not apply. * * *

Judgment of the district court affirmed.

[18] Here the court quotes from Burritt v. Saratoga County Mut. Fire Ins. Co., 5 Hill. 188, 192, 40 Am. Dec. 345 (1843), ante, p. 272, and from Clark v. Manufacturers' Ins. Co., 8 How. (U. S.) 235, 12 L. Ed. 1061 (1850).

WASHINGTON MILLS EMERY MFG. CO. v. WEYMOUTH & BRAINTREE MUT. FIRE INS. CO.

(Supreme Judicial Court of Massachusetts, 1883. 135 Mass. 503.)

Contract upon a policy of insurance for $2,400, against loss by fire, issued by the defendant company, dated February 5, 1878, for the term of one year, upon a frame building in Ashland, which was totally destroyed by fire on August 17, 1878. At the trial in the superior court, before Putnam, J., the only evidence put in by either side was the report of an auditor. The judge declined to give certain rulings requested by the defendant; ordered a verdict for the plaintiff in the sum of $2,400; and reported the case for the determination of this court. The facts and rulings requested appear in the opinion.

The case was argued at the bar in November, 1882, and was afterwards considered on briefs by all the justices.

MORTON, C. J. 1. Upon the facts found by the auditor, it is admitted that, at the time the insurance was effected, and at the time of the loss, the plaintiff had an insurable interest in the property covered by the policy. The extent and value of that interest are in controversy. The plaintiff, being the owner of the buildings and of the land on which they stood, made a deed of the land to the city of Boston, dated November 20, 1877, which contained the following clause: "The grantor corporation excepts and reserves to itself all of the buildings and structures standing on the granted lands with all machinery and fixtures; provided however that the same shall be removed from the granted premises by the grantor corporation, at its sole expense, before the first day of October next, and if not so removed the grantor forfeits all right thereto, and the same shall thenceforth be the absolute property of said city." There can be no reasonable doubt that the intention of the parties was that the buildings should remain the property of the grantor, with the right to remove and dispose of them at any time before the first day of October. * * *

2. The plaintiff had held a previous policy issued by the defendant at the time the plaintiff owned the land as well as the buildings; and the defendant asked the court to rule that the plaintiff could not recover, because he did not disclose the change of title at the time of procuring the policy in suit. The court rightly refused this ruling.

The facts found by the auditor, being uncontrolled, are to be taken as true. He has found that no fraud was committed or attempted by the plaintiff or any of its agents. The plaintiff made no misrepresentations and no concealment as to its title. The policy is upon the buildings. The defendant saw fit to issue this policy

without any specific inquiries of the plaintiff as to the title to the land, and without any representations by the plaintiff upon this point. It was its own carelessness, and it cannot avoid the policy without proving intentional misrepresentation or concealment on the part of the plaintiff. An innocent failure to communicate facts about which the plaintiff was not asked will not have this effect. Commonwealth v. Hide & Leather Ins. Co., 112 Mass. 136, 17 Am. Dec. 72; Fowle v. Springfield Ins. Co., 122 Mass. 191, 23 Am. Rep. 308; Walsh v. Philadelphia Fire Association, 127 Mass. 383.

3. The defendant asked the court to rule that, on the facts found, no contract ever existed between the plaintiff and the defendant, or, if it existed, was avoided because the minds of the parties never met, and the risk undertaken was unknown to, or misunderstood by, the defendant. The court could not properly give this ruling. The parties entered into a written contract clear and unambiguous in its terms. The minds of the parties did meet upon these terms. The fact that the defendant neglected to obtain full information as to the situation of the subject matter of the contract, or of the extent and character of the risk, cannot, in the absence of fraud or imposition, avoid the contract.† * * *

Judgment on the verdict.

CONNECTICUT FIRE INS. CO. v. COLORADO LEASING, MIN. & MILL. CO.

(Supreme Court of Colorado, 1911. 50 Colo. 424, 116 Pac. 154, Ann. Cas. 1912C, 597.)[19]

Action by the Colorado Leasing, Mining & Milling Company against the Connecticut Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

On the 27th day of May, 1904, the appellee Milling Company, hereinafter called the plaintiff, insured its reduction mill at Florence against loss by fire for a sum not exceeding $60,000, represented by policies in several different companies. Sixteen thousand dollars of this was on the mill building, $31,000 on the machinery, tools, and appliances of the mill, $8,000 on ore and mineral in the mill, $2,000 on supplies of every kind, $2,000 on the office and laboratory building, and $1,000 on the furniture of its office and assay department.

The milling property insured had for some years been the subject of litigation, and shortly before the issue of the policy in suit had been

†The remainder of the court's opinion, relating to the measure of damages, will be found at p. 608, infra.

[19] The facts are restated and abbreviated, and the latter part of the opinion, construing specific clauses of the policy, is omitted.

purchased by the plaintiff for the sum of $10,000, only part of which had been paid. It was shown, however, that before the issue of the insurance the plaintiff had expended some $3,500 in improving the mill.

The policies provided that the amount of loss, in case of fire, should be determined by the insured and insurer, and, if they could not agree, then by appraisers. On April 6, 1905, after entering into a nonwaiver agreement, the plaintiff and insurance companies compromised and adjusted the total loss at $38,809.15.

The policy upon which this action was brought was issued by the local agent of the defendant insurance company at Florence, and insured one twenty-fourth of the property in an amount not exceeding $2,500. On the 4th day of March, 1905, the property insured was totally destroyed by fire. Upon a refusal of the defendant to pay its proportion of the insurance, this action was commenced, and a trial by a jury resulted in a verdict and judgment against the defendant in the sum of $1,837.28, from which judgment the defendant appealed.

MUSSER, J. (after stating the facts). The defendant set up eleven separate defenses, each of which related to an alleged breach of some condition of the policy, which it is argued was sufficient to defeat the action. Numerous errors are assigned, most of which center about and are related to the first. The first assignment of error is that the court erred in refusing defendant's request to instruct the jury to return a verdict in its favor. The policy provided that it should be void if the insured had concealed any material fact or circumstance concerning the insurance or the subject thereof, or in case of any fraud by the insured touching any matter relating to the insurance or subject thereof, whether before or after a loss. Aside from an alleged fraudulent intent which the defendant says was concealed from it, and which will be noticed later, it is the contention of the defendant that the plaintiff concealed from it the fact that the plaintiff had purchased the property for $10,000, and had not paid the entire purchase price, and that the property had for many years, been the subject of continuous litigation and controversy, and had been idle and thereby impaired in value, and that the title had become involved in great uncertainty and dispute.

It is well to say here that there is no evidence that the title to the property had ever been involved in any litigation or uncertainty. It is true that attachment issued in aid of actions for money demands, and that executions issued upon money judgments obtained against the owner were levied upon the property, and that it had been sold under these executions, and that sheriff's deeds had issued thereon; but this litigation did not relate to the title to the property. It was not litigation between rival claimants to the property, nor was the title uncertain. The attachments and executions were levied by creditors of the owner, and the sheriff's deeds merely transferred the

undisputed and certain title of the owner to another, who obtained a title undisputed and involved in no uncertainty. It is true that the property had been idle and may have been impaired in value thereby to some extent, but that fact was as well known to the agent of the defendant as it was to the plaintiff, for that agent lived in Florence, was engaged in a business that was bound to call his attention to the activity of the various industrial enterprises of the town, and he was acquainted with the mill from the time that it was built.

The defendant claims that inasmuch as these matters, which it says were concealed, were material, the court should have instructed for it. The defendant loses sight of a very important fact in this case, and that is that no inquiry was made of the plaintiff about the matters alleged to have been concealed, and that no written application was made for this insurance. "Concealment is the designed and intentional withholding of any fact, material to the risk, which the assured in honesty and good faith ought to communicate." Clark v. Ins. Co., 40 N. H. 333, 77 Am. Dec. 721. So that a concealment involves, not only the materiality of the fact withheld and which ought to have been communicated, but also the design and intention of the insured in withholding it, and, of course, the condition in the policy must be construed in the light of this definition of a concealment with which it is concerned. If an inquiry is made about a material fact and that fact is not disclosed upon such inquiry, it is very likely that the person questioned intended to withhold it; but, if no inquiry is made, the intention to withhold the fact is not so plain.

Hence the authorities make a distinction between cases where inquiry is made and cases in which no inquiry is made. The rule is stated in Wood on Insurance, 388: "When no inquiries are made, the intention of the assured becomes material, and, to avoid the policy, they must find, not only that the matter was material, but also that it was intentionally fraudulently concealed." To the same effect are Alkan v. N. H. Ins. Co., 53 Wis. 136, 10 N. W. 91; Van Kirk v. Citizens' Ins. Co., 79 Wis. 627, 48 N. W. 798; Johnson v. Scottish Union & Nat. Ins. Co., 93 Wis. 223, 67 N. W. 416; Sanford v. Royal Ins. Co., 11 Wash. 653, 40 Pac. 609; Lancashire Ins. Co. v. Monroe, 101 Ky. 12, 39 S. W. 434, 19 Ky. Law Rep. 204; Arthur v. Palatine Ins. Co., 35 Or. 27, 57 Pac. 62, 76 Am. St. Rep. 450; 2 Clement on Ins. 3, 4.

It is thus seen that in the circumstances of this case it is not alone the materiality of the facts which were withheld that was to be found, but also whether or not the plaintiff intentionally and fraudulently withheld them. The materiality of these facts was not fixed by any writing, as is often the case in insurance, but it must be drawn from circumstances. So also must the fraudulent intent of the insured be drawn. It is said in 1 May on Insurance, § 195, that, where the materiality is to be inferred from circumstances and not upon the con-

struction of some writing, it is a question for the jury. How much more would the fraudulent intent of the insured in withholding these facts be for the jury? It was not for the court to say as a matter of law that the facts alleged to have been concealed were material, and that the insured had intentionally and fraudulently withheld them, and hence no error was committed in refusing to instruct the jury to return a verdict for the defendant so far as such concealments were concerned. The defendant itself saw the propriety of such a ruling when it asked the court in a number of instructions to submit to the jury the question of the materiality of the facts alleged to have been concealed, and that, if they found them material, to return a verdict for defendant.

The defendant is not now consistent in urging this court to say that the lower court ought as a matter of law to have said that material facts were concealed, and at the same time urge this court to say that the lower court erred in refusing to give instructions submitting the question to the jury. The mistake which the defendant made in its request for such instructions was in asking the court to tell the jury that if the facts alleged to be concealed were material they should find for the defendant, omitting in each of the requested instructions the necessary element under the facts in the case, the jury must also find that the facts were intentionally and fraudulently concealed before they could find for the defendant.

This answers a number of the assignments of error in this case relative to the refusal to give requested instructions. The jury was not wrongly instructed in this matter. If there was any failure to instruct thereon, though we do not say that there was, it was only nondirection. * * * Judgment affirmed.[20]

[20] "The first contention of the defendant company is, that Claiborne, who was an insurance agent, perpetrated a fraud upon the insurance company in his application for the policy by pretending that the building on which he applied for insurance was a dwelling house, when, in fact, it was a hotel; but in the application which by the terms of the policy is made a part thereof Claiborne described the property as a combined rooming and frame dwelling house having two stories and containing 24 rooms. This description shows that Claiborne did not represent the building to be an ordinary dwelling, and the testimony shows that at the time he made the application the house was not used as a hotel, but as a home for his family and for persons to whom he rented rooms, some of whom boarded with his family. Shortly before Claiborne's death the house had been changed to a hotel. The evidence tends to show that so far as insurance rates are concerned there is no material difference between a rooming house containing as many as 24 rooms and a hotel, and, if the rates on which this policy was issued were too low, the company, itself was to blame, as the application gave substantially a correct description of the house.

"But this matter is immaterial now for another reason. After Claiborne died one of his sons, W. L. Claiborne, went to the home office of the company, and had some negotiations with the company in reference to a change in the policy, affecting, among other things, the description of the building. The company made an amendment to the policy and mailed it, along with the policy, to W. L. Claiborne, who was acting for his mother, who was, in fact,

SECTION 4.—LIFE INSURANCE

LINDENAU v. DESBOROUGH.

(Court of King's Bench, 1828. 8 Barn. & C. 586, 3 Man. & R. 45.)

Assumpsit against the secretary of the Atlas Insurance Company on a policy of insurance on the life of the Duke of Saxe Gotha. Plea, the general issue. At the trial, before Lord Tenterden, C. J., it appeared that in 1824, an insurance was effected on the life of the duke with the Union Assurance Company. That company had an agent in Germany who, on behalf of his principals, submitted certain questions to the physicians of the duke, many of them as to specific diseases, and his habits of life; and the last was, "Is there any other circumstance within your knowledge which the directors ought to be acquainted with?" and this was answered in the negative. There was also a private certificate sent by the agent to the directors in answer to their inquiries as to certain points. In this also there was a general question—"Do you know any other circumstance which ought to be communicated to the directors?" which was answered as follows: "Agreeably to our informations, the duke has led a dissolute life in former days, by which he has lost the use of his speech, and, according to some informations, also

the owner of the property. This amendment contains the following language: 'It is understood that the property insured hereunder covers the three-story shingle roofed frame building and its contents as above described.' Now the amendment shows that the company had been informed that another story had been added to the building, and that it amended the policy so as to cover the building in its altered shape. The application for insurance made before the alteration showed that the building had 24 rooms, and with another story added the company must have known that it then probably contained several more rooms. It did, in fact, after the alteration contain 40 rooms, and the company either knew this or could have learned it by making inquiry. Having been put on inquiry by the information that another story had been added to the building, we must presume that the company knew the number of rooms it contained. Now, the application of Claiborne for insurance stated, among other things, that his total wealth was less than $15,000. It would be such an unusual thing for a man owning no more than that to build a house of 40 rooms exclusively for a dwelling house that we cannot conclude that this company at the time they made this amendment to the policy believed that it was insuring a building used for a dwelling house only. We should reach this conclusion even if W. L. Claiborne had not testified that at the time he asked for the amendment to the policy he informed the officers of the company of the extensive alterations that had been made on the building and told them that it had been changed from a rooming house to a hotel. With this information they made the amendment referred to, and thus recognized and treated the policy as still valid, and cannot now claim a forfeiture on that ground." Arkansas Mut. Fire Ins. Co. v. Claiborne, 82 Ark. 150, 100 S. W. 751 (1907).

that of his mental faculties, which, however, is contradicted by the medical men; and as little as we believe that this has any influence on his natural life, we find it our duty to mention it." The physicians in one of their answers said the duke was hindered in his speech, but did not mention the state of his mental faculties.

An application was made to the Union to insure a further sum on the duke's life; but that being contrary to their general rules, their agent handed over the proposal to the Atlas, and at the same time gave the latter company the private answers received from their agent in Germany. The plaintiff signed the usual declaration, and declarations by the duke's physicians were made to the Atlas similar to those made to the Union. Upon receiving these documents the Atlas entered into the policy. In 1825 the duke died, and it was then discovered that there had existed in his head for many years a large tumor pressing on the brain, to which the loss of speech and mental faculties might be attributed; but all the medical testimony went to establish that the symptoms during the duke's life were not such as were likely to excite suspicion that such a tumor existed, or that he was afflicted with any particular disorder tending to shorten life. One foreign physician, however, said, that had he been consulted he should have thought it right to state that he attributed the loss of speech to a paralysis of the organs of speech. And an English surgeon, called for the plaintiff, on cross-examination, said he should, in answer to the general question, "Whether he knew any other circumstances that ought to be communicated to the directors," have thought it right to mention the state of the duke's mental faculties. Upon hearing this evidence Lord Tenterden told the plaintiff's counsel he thought it made an end of his case; and he should leave it to the jury to say whether there were any facts material to be known which were not mentioned to the assurers, and that if there were, the policy was void. The plaintiff's counsel thereupon elected to be nonsuited, leave being given to him to move for a new trial, on the ground of misdirection.[21]

Lord TENTERDEN, C. J. At the trial before me, amongst other depositions, that of a foreign physician named Stark was read, wherein he stated that he would have certified that the duke was in bodily health, but that he would not have failed to observe that he labored under an inability to speak, which he attributed to a paralytic state of the nerves of the organs of speech. In addition to this, Mr. Green, a surgeon, stated, that if consulted he should have thought it right to mention the state of the duke's mental faculties; whereupon I expressed an opinion that the cause was at an end, and said that I should direct the jury to find for the defendant if they thought the plaintiff had failed to communicate to

[21] The argument of Brougham, counsel for plaintiff, is omitted.

the insurers any material circumstance within his knowledge. The only question now is, whether that direction would have been correct or not. At the time of the trial I had in my recollection, although not very accurately, the case of Morrison v. Muspratt, 4 Bing. 60, which was tried before me at Lincoln. By the printed report it appears that in April, 1823, an insurance was effected upon the life of a lady, who, at the end of 1822, had suffered from a pulmonary attack, and was attended by a surgeon. In March, 1823, a medical practitioner who had known her for some years, but did not attend her during that illness, was sent for to examine her, with a view to effecting the insurance in question; and he certified that she was in good health. In 1824, she died of a pulmonary disease. I left it to the jury generally to say whether any misrepresentation had been made; and the jury having found a verdict for the plaintiff, the Court of Common Pleas granted a new trial, on the ground that the jury ought to have been called upon to say whether it was material for the defendants to have been made acquainted with the illness of the lady in 1822.

In the present case, the insurance was upon the life of a foreigner. It appeared that a previous insurance had been effected with an office that had an agent abroad. That office was requested to make a further insurance, and being unwilling to do so, the secretary handed over to the defendant the certificate received from their foreign agent. If that had distinctly disclosed the fact now in question, I am not prepared to say that the defendant would have had any ground of complaint; but the state of the duke's faculties is not distinctly stated in that certificate. Then it is said that the party is not bound to do more than answer the questions proposed, unless he can be charged with some fraudulent concealment. Admitting this not to fall within any of the specific questions, which is not by any means clear, still the general question put by the office requires information of every fact which any reasonable man would think material. It certainly seems to me that the circumstances proved as to the state of the Duke of Saxe Gotha's mental faculties were material; and, upon the authority of the cases of Morrison v. Muspratt and Bufe v. Turner, I think I should not have done wrong in leaving the case to the jury in the manner proposed at the trial.

Bayley, J. I think that in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured; and that the proper question is, whether any particular circumstance was in fact material; and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to show that the party neglecting to give the information thought it material.

But if it be held that all material facts must be disclosed, it will be to the interest of the assured to make a full and fair disclosure of all the information within their reach. Besides the cases already mentioned, there are others establishing that the concealment of a material fact, although not fraudulent, is sufficient to vitiate a policy on a ship. On these grounds and authorities, I am of opinion that the proper question for the jury was not whether the party believed the information withheld to be material, but whether it was in fact material.[22]

[The concurring opinion of LITTLEDALE, J., is omitted.]

Rule refused.[23]

LONDON ASSURANCE v. MANSEL.

(Chancery Division, 1879. L. R. 11 Ch. Div. 363.)

This was an action by the plaintiffs, who were duly incorporated by the name of "The London Assurance," and were empowered to grant assurances on lives, to set aside an agreement to grant a policy of life assurance to the defendant.

On the 16th of August, 1878, the plaintiffs, on the application of the defendant's solicitor, sent him forms of proposal for life assurance, and on the 20th of August, 1878, the defendant left with the plaintiffs at their office a proposal for assurance on his life for £10,000. filled up on one of the plaintiffs' forms of proposal, and

[22] Lord Blackburn, in Brownlie v. Campbell, 5 App. Cas. 925, 954 (1880), states the rule thus strongly: "In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrima fides, that if you know any circumstances at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge if he does take it, you will state what you know. There is an obligation there to disclose what you know; and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy."

In Huguenin v. Rayley, 6 Taunt. 186 (1815), it was held that the assured's failure to state that the insured was in jail at the time of the issue of the policy was a matter to be submitted to the jury, who should determine whether such omission was material or not. The good faith of the assured seems to have been regarded as immaterial.

In Wheelton v. Hardesty, 8 El. & Bl. 232 (1857), where the court held that insurance taken out in good faith by one person upon the life of another was not avoided by the fraudulent representations and concealments of the life insured, since such "life" cannot be regarded as the agent of the assured in making such statements and concealments, the court showed a disposition to modify the rule laid down in the principal case. But Wheelton v. Hardesty has since been narrowly restricted to the peculiar facts of that case. See Macdonald v. Law Union Ins. Co., L. R. 9, Q. B. 332 (1874). See, also, Pollock on Contracts, *531.

[23] At nisi prius the cause was argued by Bougham, F. Pollock, and Brodrick, for the plaintiffs, and by Sir J. Scarlett, Campbell, and Coleridge, for the defendants. See the report in 3 Car. & P. 353.

The principal case was expressly followed in Joel v. Law Union Ins. Co., [1908] 2 K. B. 431, 439.

signed by the defendant. The questions and answers contained in this proposal, so far as material, were as follows:

Questions.	Answers.
"Are you now and have you always been of temperate habits?	Yes.
"State if there be any other material circumstance affecting your past or present state of health or habits of life to which the foregoing questions do not extend?	Not to my knowledge.
"Had a proposal ever been made on your life at any other office or offices? If so, Where?	Insured now in two offices for £16,000. at ordinary rates.
"Was it accepted at the ordinary premium, or at an increased premium, or declined?	Policies effected last year."

At the foot of the proposal the defendant signed the following declaration: "I declare that the above written particulars are true, and I agree that this proposal and declaration shall be the basis of the contract between me and the London Assurance."

On the same day the defendant had an interview with the medical officer of the plaintiffs, and in reply to his inquiries gave substantially the same answers as those in the proposal before stated.

The plaintiffs being, as they alleged, satisfied with and relying upon the said proposal, and with the report of their medical officer, and with the answers they had received from two friends of the defendant to whom he had referred them, sent to the defendant's solicitor a written acceptance of the proposal for an assurance of £10,000. on the defendant's life, and, on the 23d of August, 1878, received from him a cheque for the first year's premium, and on the 24th of August, 1878, the plaintiffs sent him the usual certificate as to the assurance being effected.

The plaintiffs alleged that, shortly after the last-mentioned date, they discovered that, though the defendant's life had been assured for £10,000. in the Rock Life Assurance Company, and also for £6,000. in the Equity and Law Life Assurance Society, the last-named assurance society had in November, 1877, when the defendant applied for a further assurance of £3,000., decided not to increase the amount at risk on his life; also that the defendant had shortly afterwards made proposals to the Scottish Equitable Society and to the Crown Insurance Society, who had respectively declined his proposals, to the North British and Mercantile Insurance Society, which proposal was withdrawn, and to the Liverpool,

London and Globe Company, by whom the proposal was not accepted; that in June, 1878, the English and Scottish Law Life Assurance Association, after accepting a proposal for an assurance of £5,000. on the life of the defendant, had refused to proceed with it on learning that the Equity and Law Life Society had declined the further assurance of the defendant's life; also, that in August, 1878, the defendant had applied for assurances on his life to the Clerical, Medical and General Life Assurance Society, to the Scottish Amicable Assurance Society, and the Law Life Assurance Society, but that each of the said offices had declined his proposals.

The plaintiffs alleged that they thereupon determined not to proceed with the assurance, and that their solicitors wrote to the defendant's solicitor to that effect, and sent a cheque for the amount of the premium, which was returned by the defendant.

The plaintiffs then brought their action setting out in their statement of claim the facts before stated, and alleging that it was the duty of the defendant to have informed them that his life had been refused by the said several offices, that such fact was a very material fact in a contract of life assurance, and that the plaintiffs would not have entertained the defendant's proposal for assurance had he informed them that his life had been refused by other offices, which the defendant had concealed.

The plaintiffs claimed a declaration that the acceptance by the plaintiffs of the defendant's proposal for assurance on his life for £10,000. and the contract by the plaintiffs for the assurance on the life of the defendant, were void.

The defendant, by his statement of defense, admitted the plaintiffs' allegations as to the proposal and as to the two policies that had been effected, also that the Equity and Law Life Society had decided not to increase their risk, the reason being that they considered their risk sufficiently large. With regard to the other proposals, the defendant stated as follows:

"The defendant admits that proposals were made to the Clerical, Medical and General Life Assurance Society, the Scottish Amicable Life Assurance Society, and the Law Life Assurance Society, for an assurance on his life, and such proposals were declined without any medical examination."

In paragraph 15 he stated as follows: "The defendant is not and never has been of intemperate habits of life, and although proposals for assurances on the defendant's life had been made to and declined by the several offices in the statement of claim mentioned, the defendant's life was never rejected by an office, but was passed as a first-class life by every medical officer who examined him." The defendant also stated that the English and Scottish Law Life Assurance Society passed his life as a first-class life, but they reserved the right of declining to complete the transaction at any time before the receipt of the premium; but that, having learned that the

Equity and Law Life Assurance Society had decided not to increase their risk on the defendant's life, and would not take any part of the new risk, exercised their right of declining to complete the transaction."

The defendant submitted that there had been no concealment such as to vitiate the contract.

The case was heard on motion for judgment on admissions in the pleading.[24]

Jessel, M. R. The action in this case is to set aside an agreement for assurance for life on the ground of concealment of a material fact in effecting the assurance.

The first question to be decided is, what is the principle on which the Court acts in setting aside contracts of assurance? As regards the general principle I am not prepared to lay down the law as making any difference in substance between one contract of assurance and another. Whether it is life, or fire, or marine assurance, I take it good faith is required in all cases, and, though there may be certain circumstances from the peculiar nature of marine insurance which require to be disclosed, and which do not apply to other contracts of insurance, that is rather, in my opinion, an illustration of the application of the principle than a distinction in principle.

But I think the law has been laid down very often, and I am going to refer to two or three statements of it, which at all events are binding on me.

In the case of Dalglish v. Jarvie, 2 Mac. & G. 231, 243, a case which had nothing to do with insurance, but which referred to the principles on which a special injunction ought to be granted ex parte, Lord Cranworth, then the Lord Commissioner Rolfe, says this: "Upon one point it seems to me proper to add thus much, namely, that the application for a special injunction is very much governed by the same principles which govern insurances, matters which are said to require the utmost degree of good faith, 'uberrima fides.' In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material, it is a fraud; but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy."

Here it is to be observed that he says, "In cases of insurance;" he does not say one kind of insurance or another kind of insurance, but it is the more valuable because he is stating the law as settled

[24] Arguments of counsel are omitted, as are certain parts of the opinion quoting from Lindenau v. Desborough, ante, p. 285.

as a mere illustration of the similar law which he considers to apply to applications for special injunctions when a man comes for one ex parte. If he conceals anything he knows to be material, it is fraud, and if he conceals anything that may influence the rate of premium, although he does not know it, it still vitiates the policy.

In another case, which again is not directly in point, turning on a contract, the case of Moens v. Heyworth, 10 M. & W. 147, 157, we have a dictum of Baron Parke. It was a case of ordinary mercantile contract, not of an insurance contract. Baron Parke says: "The case of a policy of insurance does not appear to me to be analogous to the present; those instruments are made upon an implied contract between the parties that everything material known to the assured should be disclosed by them. That is the basis on which the contract proceeds, and it is material to see that it is not obtained by means of untrue representation or concealment in any respect;" that means, of course, concealment in any material respect. * * *

Now I come to the facts of the case, which certainly appear to me to be very plain and clear indeed. The office of the London Assurance asks these questions: "Has a proposal ever been made on your life at any other office or offices; if so, where? Was it accepted at the ordinary premium, or declined?" and there is an agreement at the end, "That this proposal and declaration shall be the basis of the contract between the assured and the company." Here is the answer: "Insured now in two offices for £16,000. at ordinary rates. Policies effected last year." It is to be observed that the man proposing the assurance, who knows the facts, does not answer the question. The question was, "Has a proposal been made at any office or offices; if so, where?" He does not state, "I proposed to half a dozen offices," which was the truth, but simply says, "Insured now in two offices," which of course must have been intended to represent an answer, and therefore would mislead the persons receiving it, who did not look at it with the greatest attention, into the belief that he was insured in two offices, and that they were the only proposals that he had made. "Was it accepted at the ordinary premiums or an increased premium?" His answer is, "At ordinary rates." That is the answer to the second branch of the inquiry, but he has not answered the question, "or declined?" The inference, therefore, which must have been intended to be produced on the mind of the person reading the answer was that it had not been declined. And in my opinion that is the fair meaning of the answer, and the assured is not to be allowed to say, "I did not answer the question." But if it were so it would make no difference, because if a man purposely avoids answering a question, and thereby does not state a fact which it is his duty to communicate, that is concealment. Concealment properly so called means

non-disclosure of a fact which it is a man's duty to disclose, and it was his duty to disclose the fact if it was a material fact.

The question is whether this is a material fact. I should say, no human being acquainted with the practice of companies or of insurance societies or underwriters could doubt for a moment that it is a fact of great materiality, a fact upon which the offices place great reliance. They always want to know what other offices have done with respect to the lives. But in this case there could be no question as to its materiality. In the first place we have this in the answer: "The defendant admits that proposals were made to the Clerical, Medical and General Life Assurance Society, the Scottish Amicable Life Assurance Society, and the Law Life Assurance Society for an assurance on his life, and such proposals were declined." There are three proposals as admitted by the answer declined in the very words of the question; and then he goes on: [His Lordship then stated paragraph 15 of the answer, and added:] We have an admission by the defendant that no less than five insurance offices had declined to accept his life.

Now, to suppose that any one who knows anything about life insurance, that any decent special juryman could for a moment hesitate as to the proper answer to be given to the inquiry, when you go to the insurance office and ask for an insurance on your life, ought you to tell them that your proposals had been declined by five other assurance offices? is, I say, quite out of the question. There can be but one answer—that a man is bound to say, "My proposals have been declined by five other offices. I will give you the reasons, and shew you that it does not affect my life," as he admits it to be by this answer; but of that the office could judge. There can be no doubt, as a proposition to be decided by a jury, that such a circumstance is material. But in fact I have elements here admitted on the pleadings for deciding that question quite irrespective of the ordinary knowledge of the practice of mankind in respect of these matters which is to be imputed to a good special juryman, because I have here two things admitted, first of all that the proposal which forms the basis of the contract asks a question —Has a proposal been declined?

Now where it is to form the basis of the contract it is material, because, as was held in a case in the House of Lords of Henderson v. Fitzgerald, 4 H. L. C. 484, where it is part of the contract, the other side cannot say it is not material. So here we have the proposal as the basis of the contract. It is impossible for the assured to say that the question asked is not a material question to be answered, and that the fact which the answer would bring out is not a material fact.

Further, we have this, that within the defendant's own knowledge the English and Scottish Law Life Assurance Society having accepted his life, which had been duly passed by their medical of-

ficer as a first-class life after examination, and merely reserving a right to decline, when they found that one other office, not five, but one, had declined the life, or rather the proposal, at once withdrew from their acceptance and declined his proposal. So that the defendant had the strongest reasons for believing from actual knowledge that the fact of a proposal having been declined was a most material circumstance, and would have the greatest effect on the mind of the proposed assurers.

It seems to me a very plain and clear case, and that the plaintiffs are consequently entitled to judgment.

The order will be—The plaintiffs being willing and hereby offering to return the premium, declare that the acceptance by the plaintiffs of the defendant's life was void and of no effect, that they were not bound to deliver the policy, and that the contract be delivered up to be cancelled.[25]

PHŒNIX MUT. LIFE INS. CO. v. RADDIN.

(Supreme Court of the United States, 1886. 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644.)

In Error to the Circuit Court of the United States for the District of Massachusetts.

Action on life insurance policy. Plaintiff had judgment below.

GRAY, J. This was an action brought by Sewell Raddin, and prosecuted by his administrator, upon a policy of life insurance dated April 25, 1872, the material parts of which were as follows: "This policy of assurance witnesseth that the Phœnix Mutual Life Insurance Company of Hartford, Conn., in consideration of the representations made to them in the application for this policy, and of the sum of one hundred and fifty-two dollars and ten cents to them duly paid by Sewell Raddin, father, and of the semi-annual payment of a like amount on or before the twenty-fifth day of April and October in every year during the continuance of this policy, do assure the life of Charles E. Raddin, of Lynn, in the county of Essex, state of Massachusetts, in the amount of ten thousand dollars, for the term of his natural life. This policy is issued and accepted by the assured upon the following express conditions and agreements," namely, among others, that "if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, this policy shall be null and void." The application was signed by Sewell Raddin, both for his son and for himself, and contained 29 printed "questions to be answered by the

[25] See, in accord: Talley v. Metropolitan Life Ins. Co., 111 Va. 778, 69 S. E. 936 (1911).

person whose life is proposed to be insured, and which form the basis of the contract," three of which, with the written answers to them, and the concluding paragraph of the application, were as follows:

"(10) Is the party addicted to the habitual use of spirituous liquors or opium?	No.
"(28) Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the No. of policy.	$10,000, Equitable Life Assurance Society.
"(29) Is the party and the applicant aware that any untrue or fraudulent answers to the above queries, or any suppression of facts in regard to the health, habits, or circumstances of the party to be assured, will vitiate the policy, and forfeit all payments thereon?	Yes.

"It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that this application shall form the basis of the contract for insurance, which contract shall be completed only by delivery of policy, and that any untrue, or fraudulent answers, any suppression of facts, or should the applicant become as to habits, so far different from condition now represented to be in as to make the risk more than ordinarily hazardous, or neglect to pay the premium on or before the day it becomes due, shall and will render the policy null and void, and forfeit all payments made thereon."

It was admitted at the trial that all premiums were paid as they fell due; that Charles E. Raddin died July 18, 1881; and that at the date of this policy he had an endowment policy in the Equitable Life Insurance Society for $10,000, which was afterwards paid to him.

One of the defenses relied on at the trial was that the answer to question 28 in the application was untrue, and that there was a fraudulent suppression of facts material to the insurance, because the plaintiff, by his answer to that question, "$10,000, Equitable Life Assurance Society," intended to have the defendant understand that the only application which had been made to any other company for assurance upon the life of his son was one made to the Equitable Life

Assurance Society, upon which that society had issued a policy of $10,000, whereas in fact the plaintiff, within three weeks before the application for the policy in suit, had made applications to that society, and to the New York Life Insurance Company, for additional insurance upon the son's life, each of which had been declined. The defendant offered to prove that the two other applications were made and declined as alleged, and that the facts as to the making and the rejection of both those applications were known to the plaintiff, and intentionally concealed by him, at the time of his application to the defendant; and upon these offers of proof asked the court to rule—First, that the answer to question 28 was untrue, and therefore no recovery could be had on this policy; second, that there was a suppression of facts by the plaintiff, and therefore he could not recover: and, third, "that the answer to question 28 must be construed to be an answer to all the clauses of that question, and as such was misleading, and amounted to a concealment of facts which the defendant was entitled to know, and the plaintiff was bound to communicate." But the court excluded all the evidence so offered, declined to give any of the rulings asked for, and ruled "that, if the answer to one of the interrogatories of question 28 was true, there would be no breach of the warranty; that the failure to answer the other interrogatories of question 28 was no breach of the contract; and that, if the company took the defective application, it would be a waiver on their part of the answers to the other interrogatories of that question." The jury having returned a verdict for the plaintiff in the full amount of the policy, the defendant's exceptions to the refusal to rule as requested, and to the rulings aforesaid, present the principal question in the case.

The rules of law which govern the decision of this question are well settled, and the only difficulty is in applying those rules to the facts before us. Answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant. Moulor v. American Ins. Co., 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447; Campbell v. New England Ins. Co., 98 Mass. 381; Thomson v. Weems, 9 App. Cas. 671.

The misrepresentation or concealment by the assured of any material fact entitles the insurers to avoid the policy. But the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract. Carpenter v. Providence

Washington Ins. Co., 16 Pet. 495, 10 L. Ed. 1044; Jeffries v. Life Ins. Co., 22 Wall. 47, 22 L. Ed. 833; Anderson v. Fitzgerald, 4 H. L. Cas. 484; Macdonald v. Law Union Ins. Co., L. R. 9 Q. B. 328; Edington v. Ætna Life Ins. Co., 77 N. Y. 564; s. c., 100 N. Y. 536, 3 N. E. 315.

Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application. Cazenove v. British Equitable Assurance Co., 29 Law J. C. P. (N. S.) 160, affirming s. c., 6 C. B. (N. S.) 437. But where upon the face of the application, a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial. Connecticut Ins. Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. 949, 27 L. Ed. 800; Hall v. People's Ins. Co., 6 Gray (Mass.) 185; Lorillard Ins. Co. v. McCulloch, 21 Ohio St. 176, 8 Am. Rep. 52; American Ins. Co. v. Mahone, 56 Miss. 180; Carson v. Jersey City Ins. Co., 43 N. J. Law, 300, 39 Am. Rep. 584; s. c., 44 N. J. Law, 210; Lebanon Ins. Co. v. Kepler, 106 Pa. 28.

The distinction between an answer apparently complete, but in fact incomplete, and therefore untrue, and an answer manifestly incomplete, and as such accepted by the insurers, may be illustrated by two cases of fire insurance, which are governed by the same rules in this respect as cases of life insurance. If one applying for insurance upon a building against fire is asked whether the property is incumbered, and for what amount, and in his answer discloses one mortgage, when in fact there are two, the policy issued thereon is avoided. Towne v. Fitchburg Ins. Co., 7 Allen (Mass.) 51. But if to the same question he merely answers that the property is incumbered without stating the amount of incumbrances, the issue of the policy without further inquiry is a waiver of the omission to state the amount. Nichols v. Fayette Ins. Co., 1 Allen (Mass.) 63.

In the contract before us the answers in the application are nowhere called warranties, or made part of the contract. In the policy those answers and the concluding paragraph of the application are referred to only as "the declarations or statements upon the faith of which this policy is issued;" and in the concluding paragraph of the application the answers are declared to be "fair and true answers to the foregoing questions," and to "form the basis of the contract for insurance." They must therefore be considered, not as warranties which are part of the contract, but as representations collateral to the contract, and on which it is based.

The twenty-eighth printed question in the application consists of four successive interrogatories, as follows: "Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured

on the life of the party, and in what companies? If already assured in this company, state the No. of policy." The only answer written opposite this question is "$10,000, Equitable Life Assurance Society." The question being printed in very small type, the answer is written in a single line midway of the opposite space, evidently in order to prevent the ends of the letters from extending above or below that space; and its position with regard to that space, and to the several interrogatories combined in the question, does not appear to us to have any bearing upon the construction and effect of the answer.

But the four interrogatories grouped together in one question, and all relating to the subject of other insurance, would naturally be understood as all tending to one object,—the ascertaining of the amount of such insurance. The answer in its form is responsive, not to the first and second interrogatories, but to the third interrogatory only, and fully and truly answers that interrogatory by stating the existing amount of prior insurance, and in what company, and thus renders the fourth interrogatory irrelevant. If the insurers, after being thus truly and fully informed of the amount and the place of prior insurance, considered it material to know whether any unsuccessful applications had been made for additional insurance, they should either have repeated the first two interrogatories, or have put further questions. The legal effect of issuing a policy upon the answer as it stood was to waive their right of requiring further answers as to the particulars mentioned in the twenty-eigth question, to determine that it was immaterial, for the purposes of their contract, whether any unsuccessful applications had been made, and to estop them to set up the omission to disclose such applications as a ground for avoiding the policy. The insurers, having thus conclusively elected to treat that omission as immaterial, could not afterwards make it material by proving that it was intentional.

The case of London Assur. v. Mansel, 11 Ch. Div. 363, on which the insurers relied at the argument, did not arise on a question including several interrogatories as to whether another application had been made, and with what result, and the amount of existing insurance, and in what company. But the application or proposal contained two separate questions,—the first whether a proposal had been made at any other office, and, if so, where; the second whether it was accepted at the ordinary premium, or at an increased premium, or declined; and contained no third question or interrogatory as to the amount of existing insurance, and in what company. The single answer to both questions was, "Insured now in two offices for £16,000, at ordinary rates. Policies effected last year." There being no specific interrogatory as to the amount of existing insurance, that answer could apply only to the question whether a proposal had been made, or to the question whether it had been accepted, and at what rates, or declined; and as applied to either of those questions it was in fact, but not upon its face, incomplete, and therefore untrue. As

applied to the first question, it disclosed only some, and not all, of the proposals which had in fact been made; and, as applied to the second question, it disclosed only the proposals which had been accepted, and not those which had been declined, though the question distinctly embraced both.

That case is thus clearly distinguished in its facts from the case at bar. So much of the remarks of Sir George Jessel, M. R., in delivering judgment, as implies that an insurance company is not bound to look with the greatest attention at the answers of an applicant to the great number of questions framed by the company or its agents, and that the intentional omission of the insured to answer a question put to him is a concealment which will avoid a policy issued without further inquiry, can hardly be reconciled with the uniform current of American decisions. For these reasons, our conclusion upon this branch of the case is that there was no error of which the company had a right to complain, either in the refusals to rule, or in the rulings made. * * *

Judgment affirmed.[26]

[26] See, in accord: O'Connor v. Modern Woodmen of America, 110 Minn. 18, 124 N. W. 454, 25 L. R. A. (N. S.) 1244 (1911).

"We now come to the questions of evidence with respect to the $5,000 policy in the New York Life Insurance Company which Schardt omitted in his answer to the question concerning other insurances. It is first insisted for the plaintiff below that his answer was not untrue. He was asked if he had other policies in other companies, and, if so, to state the companies and amount. It is urged that when he gave three such policies the question was answered correctly, and that his failure to give the fourth policy did not involve a false statement, but only left the answer incomplete, but true in everything stated. Several cases are cited to the point that such an answer is not a misrepresentation. In Perrins v. Society, 2 El. & El. 317 (1859), the applicant was asked what was his profession, and he answered that he was an "esquire." In fact, he was an ironmonger. It was held that there was no misrepresentation here, but, at the most, only a concealment or falsehood by implication; that the answer was true, as far as it went. The same ruling was made by the court of appeals of New York in Dilleber v. Home Life Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182 (1877). There the applicant was asked to state the physicians he had consulted in the last 10 years. He answered that he had consulted Dr. Paine 9 years before. In fact, he had also consulted another physician. It was held that, the answer being true as far as it went, there was no breach of the warranty; that the answer was full and true. We do not think that these cases can be supported. In Phœnix Mut. Life Ins. Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644 (1887), the supreme court held that, where the answers to questions were obviously incomplete, the insurance company, by failing to inquire further before issuing the policy, waived any right to complain of such incompleteness; but the court clearly indicated its view that if such an answer was apparently complete, but in fact was otherwise, it was a false answer, and a breach of the warranty of its full truth. Towne v. Fitchburg Mut. Fire Ins. Co., 7 Allen (Mass.) 52, 53 (1863); London Assurance v. Mansel, 11 Ch. Div. 363 (1879); Bliss, Ins. (2d Ed.) 189, 190; Phil. Ins. §§ 550, 565, 567. The answer to such a question contains the necessary implication that there is no other insurance than that stated, and, if there is other insurance, it is as false as if the existence of other insurance were expressly denied."—Taft, J., in Penn Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co., 37 U. S. App. 692, 19 C. C. A. 286, 72 Fed. 413, 421, 38 L. R. A. 33 (1896). See, also, Talley v. Metropolitan Life Ins. Co., 111 Va. 778, 69 S. E. 936 (1911).

PENN MUT. LIFE INS. CO. v. MECHANICS' SAVINGS BANK & TRUST CO.

(Circuit Court of Appeals, Sixth Circuit, 1896. 37 U. S. App. 692, 19 C. C. A. 286, 72 Fed. 413, 38 L. R. A. 33.) [27]

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

This action was on a policy of insurance for $10,000 issued December 2, 1892, by the Penn Mutual Life Insurance Company to John Schardt, on his own life. Schardt died April 17, 1893, during the currency of the policy. Just before his death he had assigned the policy to the Mechanics' Savings Bank of Nashville, to secure a large debt owed by him to the bank. The trial resulted in a judgment for the full amount of the policy and interest, in favor of the plaintiff below, and the insurance company brings the judgment here for review on writ of error. The defendant filed 19 pleas to the declaration, averring that both by misrepresentation of facts warranted to be true in the application and policy, and by concealment of a fact material to the risk, the policy was avoided.

Schardt's salary as teller was $1,500, and he had but a small amount of property. When he died in April, 1893, he had $80,000 of insurance on his life, nearly all of which had been written within six months. It was conceded that, for more than a year prior to his death, Schardt had been constantly embezzling the funds of his bank, and that his indebtedness to the bank thus criminally incurred amounted at the time of the application for this policy to little less than $100,000, and at his death exceeded that sum. H did not disclose the fact of his crime to the defendant at the time of his application, or at any other time. His death in April, 1893, was caused by congestion of the brain and other vital organs, caused by the mental strain which a disclosure of his crime brought on.

To the charge of the court that Schardt's failure to disclose to the insurer the fact of his defalcation would not avoid the policy unless intentional and fraudulent, the defendant took the following exception: "(4) Said counsel next then and there excepted to so much of said charge as instructs the jury that before the failure of John Schardt, the insured, to disclose to the defendant company the fact of his defalcation to the plaintiff bank, at the time of the application and policy in question, could be available as a defense to his action, the concealment must have been intentional on the part of the said insured, and that, if his failure to divulge the fact arose from any of the causes

[27] Only such parts of the statement of facts and of the opinion as relate to the issue of concealment are here printed.

stated in said charge, that such defense could not be established; and said counsel, insisting that the purpose, design, or intention of the insured in withholding the fact from the knowledge of the company is not material in making out said defense, except to the opinion of the court in its decision to the contrary."

Before TAFT and LURTON, Circuit Judges, and HAMMOND, District Judge.

TAFT, Circuit Judge. * * * For the error in excluding evidence of false statements concerning other insurance in the subsequent policies, the judgment herein must be reversed. The case will doubtless be tried again, however; and it becomes our duty, therefore, to examine and decide other questions made upon this record by the defendant which must, of necessity, arise again on the second trial. * * *

The trial court held, against the objection of defendant, that, when Schardt was asked what his occupation was, he answered truly that he was a bank teller, and that the scope of the question was not such as to require him to add that he was an habitual embezzler. We concur in this view. Neither the company nor Schardt could have thus understood the question. The embezzling was merely misfeasance in his position as teller. He was an unfaithful bank teller. But nothing in the question called upon him to say whether he was a good or bad bank teller.

In New York Bowery Fire Ins. Co. v. New York Fire Ins. Co., 17 Wend. 359, the issue was whether a contract of reinsurance was avoided by the failure of the company seeking reinsurance to communicate to the reinsurer facts known to it reflecting on the character of the original insured. The supreme court of New York held that it was, but in doing so expressed, through Justice Bronson, its opinion of what the duty of the original insured was in this regard: "The general doctrine [i. e. of concealment] on this subject is not denied, but it is said that the character of Mortimer [i. e. the original insured] was not a fact material to the risk; that the person applying for insurance is not bound to say anything about his own character. The last branch of the remark is undoubtedly true. Had Mortimer applied to defendants for insurance, he was not bound, nor could it be expected, that he should speak evil of himself. Good manners on the part of the underwriter, and self-respect on the part of the applicant, would forbid a conversation on the subject of character. If the underwriter wished information on that point, he would naturally seek it from some other source." 17 Wend. 366, 367. This passage is referred to with approval by the supreme court of the United States in the case of Sun Mut. Ins. Co. v. Ocean Ins. Co., 107 U. S. 485, 510, 1 Sup. Ct. 582, 27 L. Ed. 337.

Justice Bronson's discussion related to the disclosure of a fact not inquired about, and the rule there laid down was, of course,

not intended to relieve an applicant from answering questions put to him, which, in their necessary scope, require statements from him which relate to his moral character. Nevertheless the reasoning of the court justifies the conclusion that the insured is not called upon to construe a simple question concerning his ordinary vocation into one calling for a statement of crimes or misfeasances of which he may have been guilty in pursuing such vocation. Then it is said that he had expressly warranted that, in his statements and answers in this application, no circumstances or information had been withheld touching his past and present state of health and habits of life, with which the Penn Mutual Life Insurance Company ought to be made acquainted, and that his habit of embezzling should have been communicated, to comply with that warranty. We are of opinion that these words refer to questions and answers in the application, and are equivalent to a warranty that the answers to the questions are full and complete. The habits of life referred to are those inquired about in the medical examination, and are those which have a direct relation to physical health, and could not be construed to refer to thefts or embezzlements of which the applicant may have been guilty, and concerning which no inquiry was made.

But, even if Schardt was not required by any specific question to disclose the fact of his embezzlements, the policy would still be avoided, if it were material to the risk, and he intentionally concealed it from the company. This is not controverted. The issue of law between the parties is whether the policy would not be avoided, even if his failure to disclose it were due, not to fraudulent intent, but to mere inadvertence, or a belief that it was not material. It is insisted for the plaintiff in error that the motive or cause of the nondisclosure is unimportant, if the fact be found material to the risk, and was known to the insured when he obtained the insurance. The trial court took the other view, and instructed the jury accordingly. If this were a case of marine insurance, the contention for the plaintiff in error must certainly be sustained.

The great and leading case on the subject is that of Carter v. Boehm, 3 Burrows, 1905.[28] * * * That it states the rule enforced by the courts of this country in cases of marine insurance is established by many decisions. Perhaps the one most recently considered by the supreme court of the United States was a case of reinsurance of a marine risk. Sun Mut. Ins. Co. v. Ocean Ins. Co., 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337.

The very marked difference between the situation of the parties in marine insurance and that of parties to a fire or life policy has led many courts of this country to modify the rigor of the

[28] Ante, p. 234. A quotation from and discussion of this case are omitted.

doctrine in its application to fire and life insurance, and to lean towards the view that no failure to disclose a fact material to the risk, not inquired about, will avoid the policy, unless such nondisclosure was with intent to conceal from the insurer a fact believed to be material; that is, unless the nondisclosure was fraudulent. In marine insurance the risk was usually tendered and accepted when the vessel was on the high seas, where the insurer had no opportunity to examine her, or to know the particular circumstances of danger to which she might be exposed. The risk in such a case is highly speculative, and it is manifestly the duty of the insured to advise the insurer of every circumstance within his knowledge from which the probability of a loss can be inferred, and he cannot be permitted to escape the obligation by a plea of inadvertence or negligence.

In cases of fire and life insurance, however, the parties stand much more nearly on an equality. The subject of the fire insurance is usually where the insurer can send its agents to give it a thorough examination, and determine the extent to which it is exposed to danger of fire from surrounding buildings, or because of the plan or material of its own structure. The subject of life insurance is always present for physical examination by medical experts of the insurer, who often acquire, by lung and heart tests, and by chemical analysis of bodily excretions, a more intimate knowledge of the bodily condition of the applicant than he has himself. Then, too, the practice has grown of requiring the applicant for both fire and life insurance to answer a great many questions carefully adapted to elicit facts which the insurer deems of importance in estimating the risk. In life insurance, not only is the applicant required to answer many general questions concerning himself and his ancesters, but he is also subjected to an extended examination concerning his bodily history.

This was true in the case at bar. When the applicant has fully and truthfully answered all these questions, he may rightfully assume that the range of the examination has covered all matters within ordinary human experience deemed material by the insurer, and that he is not required to rack his memory for circumstances of possible materiality, not inquired about, and to volunteer them. He can only be said to fail in his duty to the insurer when he withholds from him some fact which, though not made the subject of inquiry, he nevertheless believes to be material to the risk, and actually is so, for fear it would induce a rejection of the risk, or, what is the same thing, with fraudulent intent. A strong reason why the rule as to concealment should not be so stringent in cases of life insurance as in marine insurance is that the question of concealment rarely, if ever, arises until after the death of the applicant, and then the mouth of him whose silence and whose knowledge it is claimed avoid the policy is closed. The

application is generally prepared, and the questions are generally answered, under the supervision of an eager life insurance solicitor. Only the barest outlines of the conversations between the applicant and the solicitor are reduced to writing. The applicant is likely to trust the judgment of the solicitor as to the materiality of everything not made the subject of express inquiry, and, with the solicitor's strong motive for securing the business, there is danger that facts communicated to him may not find their way into the application.

With respect to a contract thus made, it is clearly just to require that nothing but a fraudulent nondisclosure shall avoid the policy. Nor does this rule result in practical hardship to the insurer, for in every case where the undisclosed fact is palpably material to the risk the mere nondisclosure is itself strong evidence of a fraudulent intent. Thus, if a man, about to fight a duel, should obtain life insurance without disclosing his intention, it would seem that no argument or additional evidence would be needed to show the fraudulent character of the nondisclosure. On the other hand, where men may reasonably differ as to the materiality of a fact concerning which the insurer might have elicited full information, and did not do so, the insurer occupies no such position of disadvantage in judging of the risk as to make it unjust to require that before the policy is avoided it shall appear, not only that the undisclosed fact was material, but also that it was withheld in bad faith. To hold that good faith is immaterial in such a case is to apply the harsh and rigorous rule of marine insurance to a class of insurance contracts differing so materially from marine policies in the circumstances under which the contracting parties agree that the reason for the rule ceases. The authorities are not uniform, and we are able to take that view which is more clearly founded in reason and justice. In England, the tendency of the courts has been to hold that the same rules apply to fire and life insurance as to marine insurance, in reference to the effect of the concealment of material facts.[29] * * *

In the course of the argument in Lloyd's Case, Baron Parke approves the statement of some able American law writer on insurance,—presumably Mr. Duer,—that the rule for the necessity of the disclosure of all material circumstances in cases of insurance is founded on mercantile usage, and not upon fraud. 10 Exch. 531. This only confirms our view that the rule had its origin in the peculiar exigencies of a very speculative business,

[29] Here the court, with occasional quotations, commented briefly upon Bufe v. Turner, 6 Taunt. 338 (1815); Huguenin v. Rayley, 6 Taunt. 186 (1815); Morrison v. Muspratt, 4 Bing. 60 (1827); Lindenau v. Desborough, 8 Barn. & C. 586 (1828); London Assurance v. Mansel, L. R. 11 Ch. Div. 363 (1879); Abbott v. Howard, Hayes, 381 (1832); North British Ins. Co. v. Lloyd, 10 Exch. 523 (1854); Magee v. Manhattan Life Ins. Co., 92 U. S. 93, 23 L. Ed. 699 (1875).

to wit, marine insurance. To enforce it in respect to life insurance is to transfer the result of a usage prevailing in one branch of business to another, where the conditions are very different, and are of a character that prevents the possibility of the existence of a definite usage, well known to both parties, in respect to the contracts made. It is the business of shipowners and their brokers frequently to deal in insurance, and they may be presumed to know the usages prevailing with respect to contracts that they are constantly making. In life insurance the insured never makes a business of taking such insurances, and in most cases he takes but one policy.[30] * * *

Coming now to the American authorities, we find very early in reported cases a disposition to depart from the strict rules of marine insurance law in the consideration of fire and life policies. In Loan Co. v. Snyder, 16 Wend. 481, 30 Am. Dec. 118, Chancellor Walworth, delivering the opinion of the supreme court of errors of New York, refers to the peculiar rule of construction applied to that "anomalous and informal instrument called a 'marine policy,'" and expresses the opinion that it is not to be applied in its strictness to fire policies. The same view is expressed in Jolly's Adm'rs v. Baltimore Equitable Soc., 1 Har. & G. 295, 18 Am. Dec. 288, by the court of appeals of Maryland.[31] * * *

There are many other cases of fire insurance in which it is held that a nondisclosure of a material fact not inquired about does not avoid the policy unless it appears to have been withheld with fraudulent intent. Alkan v. Insurance Co., 53 Wis. 136, 10 N. W. 91; Van Kirk v. Insurance Co., 79 Wis. 627, 48 N. W. 798; Insurance Co. v. Stultz, 87 Va. 629, 636, 13 S. E. 77; Sanford v. Insurance Co., 11 Wash. 653, 40 Pac. 609; Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co., 41 Fed. 271.

The number of life insurance cases in which the question has arisen is small. In Rawls v. Insurance Co., 27 N. Y. 287, 84 Am. Dec. 280, the court of appeals held that, where an applicant for

[30] Here, with brief comment or quotation, the court referred to Pollock on Contracts, 490, note i; Wheelton v. Hardesty, 8 El. & Bl. 232, 283 (1857); Phœnix Mut. Life Ins. Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644 (1887); Thomson v. Weems, 9 App. Cas. 671 (1884).

[31] The court here cited, usually with comment, the following cases: Burritt v. Saratoga County Mut. Fire Ins. Co., 5 Hill (N. Y.) 188, 40 Am. Dec. 345 (1843); Clark v. Manufacturers' Ins. Co., 8 How. 235, 249, 12 L. Ed. 1061 (1850); Gates v. Madison County Mut. Ins. Co., 5 N. Y. 469, 55 Am. Dec. 360 (1851); Browning v. Home Ins. Co., 71 N. Y. 508, 27 Am. Rep. 86 (1877); Woodruff v. Imperial Fire Ins. Co., 83 N. Y. 133 (1880); Short v. Home Ins. Co., 90 N. Y. 16, 43 Am. Rep. 138 (1882); Haight v. Continental Ins. Co., 92 N. Y. 55 (1883); Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 684 (1853); Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535, 20 Am. Dec. 547 (1830); Washington Mills Emery Mfg. Co. v. Weymouth & B. Mut. Fire Ins. Co., 135 Mass. 503 (1883); Daniels v. Hudson River Fire Ins. Co., 12 Cush. 416, 59 Am. Dec. 192 (1853).

life insurance fully and truly answered all questions put to him by the company, the mere omission to state matter, though material to the risk, would not be a concealment, and would not affect the validity of the policy, because the applicant might presume that the insurer had questioned him on all subjects which he deemed material. In Mallory v. Insurance Co., 47 N. Y. 52, 57, 7 Am. Dec. 410, the same court sustained a charge to the jury, that, if the applicant did not conceal any fact which, in his own mind, was material in making the application, the policy was not void. See, also, Cheever v. Insurance Co., 4 Am. Law Rec. 155.

In Vose v. Insurance Co., 6 Cush. 42, the supreme judicial court of Massachusetts announced the principle, as applicable to life policies, that the concealment of a material fact will avoid the policy, though it is the result of accident or negligence, and not of design. The case did not call for the application of such a principle. The applicant was asked if he was afflicted with any disease. He answered that he was not. At the time he had consumption, and had experienced several of the premonitory symptoms. His answers were made the basis of the policy. It is probable that the term "concealment," as used in this case, refers to an incomplete answer to a general question, rather than a failure to volunteer a fact not asked for, because the court uses in the opinion language which is incorporated in the headnote as follows: "It is the duty of the insured to disclose all material facts within his knowledge. Although specific questions, applicable to all men, are proposed by the insurers, yet there may be particular circumstances affecting the individual to be insured, which are not likely to be known to the insurers; and the concealment of a material fact, when a general question is put by the insurers, at the time of effecting the policy, which would elicit that fact, will vitiate the policy."

But, whatever the effect of this case, we think the modern tendency, even of Massachusetts decisions, is to require that a nondisclosure of a fact not inquired about shall be fraudulent, before vitiating the policy; and, as already stated, this view is founded on the better reason. The subject is by no means as clear, upon the authorities, as could be wished, and the text writers find much difficulty in reconciling the cases. May, Ins. (3d Ed.) §§ 202, 203, 207. We hold that the charge of the circuit court upon this question was correct.[32] * * *

[32] In Northwestern Life Ins. Co. v. Montgomery, 116 Ga. 799, 42 S. E. 79 (1902), the court instructed the jury to find for the plaintiffs if they believed that the insured made certain statements without intending to deceive the company and without intent to procure it to issue on such false statements the policy of insurance. In holding these instructions erroneous, the court said: "Of course, intention is generally a question for the determination of the jury; and the conduct of the parties, as showing a fraudulent intent, is generally for their consideration. But in the present case

For the error already referred to in the exclusion of evidence, the judgment of the circuit court is reversed, with instructions to order a new trial.

SECTION 5.—GUARANTY INSURANCE

SEATON v. BURNAND.

(House of Lords. [1900] App. Cas. 135.)

An action was brought by the appellant against the respondent on a policy which was dated Lloyd's, E. C., December 2, 1897, and ran as follows:

"Whereas, Mrs. Louisa Christian Seaton has advanced to Major-General Barwell the sum of fifteen thousand pounds on his promissory note for £15,000., dated 3d December, 1897, and due on the 3d June, 1898; and whereas Sir Frederick Seager Hunt, Bart., has guaranteed to the said Mrs. Louisa Christian Seaton the due payment of the said bill for £15,000.: We, the undersigned underwriters, in consideration of a premium of fifty shillings per cent., which we hereby acknowledge to have received, each for himself and not one for another, hereby guarantee the solvency of the said Sir Frederick Seager Hunt, Bart., in respect of and to the extent of the said bill for £15,000. No claim to attach to this policy until the said Sir Frederick Seager Hunt, Bart., shall have a receiving order in bankruptcy made against him, or shall call a meeting of his creditors or, in the event of the decease of the said Sir Frederick Seager Hunt, Bart., before payment of the said promissory note, his estate be insolvent."

The respondent defended the action on the ground of misrepresentation and concealment of material facts.

the facts were such that they could properly have but one finding. The applicant for insurance made in his application a false statement with reference to a material matter of fact. This statement was false, within his knowledge. It was made with a view to procuring the insurance; was made deliberately, and with an agreement that it should be regarded as a warranty, and as a part of the consideration of the contract of insurance. The company had no notice of its falsity, and acted upon it to its injury. Purposely misstating this material fact, in order to induce the company, relying upon it, to enter into a contract which might prejudice its rights, would be consistent with no other intention than one to deceive the company. The intention to deceive, coupled with the other facts in the case, conclusively showed fraud, in the legal acceptation of the term. What the applicant thought or intended with reference to the consequences of his falsehood cannot be material. He is presumed to have intended the natural consequence of what he purposely and knowingly did. We are therefore of opinion that the company completely made out its defense, and that the evidence of the plaintiffs was insufficient to overcome it. We are also of opinion that the court erred, under the evidence adduced, in leaving the jury free to find that there was no bad faith or intent to deceive on the part of the insured, and that a verdict for the plaintiffs would be authorized."

At the trial before Bigham, J., and a special jury it appeared (omitting conflicting evidence) that the £15,000. was made up of the amount of a former promissory note, unpaid, a present advance to General Barwell of over £8,000., and interest at the rate of over 30 per cent. General Barwell also agreed to pay interest at the rate of 30 per cent. on the sum of £15,000. if the promissory note was not paid at maturity. The appellant being desirous of insuring Sir F. S. Hunt's guarantee sent her agent, Mr. John Lion, to the respondent to arrange it, but did not tell Mr. Lion the rate of interest or the circumstances of the loan, and these were not disclosed to the respondent. Mr. Lion told the respondent that Sir F. S. Hunt was a very wealthy man: the respondent said that he must make inquiries of Sir F. S. Hunt's banker, and went with Mr. Lion to the banker, who was also the respondent's banker. The banker told the respondent that there was a certain amount of Sir F. S. Hunt's paper about, but he believed he was good for £15,000. The respondent underwrote the policy for £240., and others underwrote it for various amounts. In 1898 Sir F. S. Hunt called a meeting of his creditors, and the note was never paid. In answer to questions put by Bigham, J., the jury found that the transaction was not one of exceptional risk, and that the respondent acted both upon the information he got from Mr. Lion and from that which he got from the banker. Both parties agreed that no other questions need be left to the jury, and Bigham, J., entered judgment for the appellant for £240. Upon a motion to enter judgment for the respondent or for a new trial on the grounds that the verdict was against the weight of the evidence and for misdirection, the Court of Appeal (A. L. Smith, Collins and Romer, L. JJ.) ordered a new trial upon the ground that this question (inter alia) should have been left to the jury: Whether taking into account the statement made to the underwriters it was a concealment of a material fact not to disclose to them the circumstances under which the loan to General Barwell had been made and the rate of interest demanded and obtained. [1899] 1 Q. B. 782. Against that decision the appellant brought this appeal, and the respondent brought a cross-appeal asking for judgment.[33]

Earl of Halsbury, L. C. My Lords, in my view of this case it might be very simply dealt with indeed, but out of respect to the learned judges who have taken a different view of it I will just say a word or two upon the grounds upon which it is to my mind exceedingly clear that this judgment of the Court of Appeal must be reversed.

My Lords, we have had a great many topics urged upon us which seem to me very irrelevant to the real question which is here being determined. This was a transaction in which a person borrowing money, it is said, at a very high rate of interest—30 per cent.—was

[33] Arguments of counsel are omitted.

guaranteed by a gentleman at that time of very high commercial credit, and the person lending the money insisted upon the additional circumstance that there should be the guarantee of a policy at Lloyd's for the purpose, not of establishing a right to have the money paid, but to guarantee the solvency of the gentleman, as to whom I do not now know that there was the smallest reason to doubt that he was a perfectly solvent person at that time—and I do not know that there was any one who could, or did—certainly nobody did at the trial—suggest any circumstance known to the lender which would to any degree diminish by a feather's weight the solvency of Sir Frederick Seager Hunt. Under these circumstances underwriters at Lloyd's underwrite what I will call this policy for the guarantee of the solvency of Sir Frederick Seager Hunt. That was the contract upon which they entered and upon which they are now being sued.

My Lords, what is the case set up now? Except for a suggestion made by the learned counsel, for which there is not the faintest scrap of evidence, that there may have been something affecting the solvency of Sir Frederick Seager Hunt, the case set up now is: "We wanted what is compendiously called now the whole transaction explained to those who were going to enter into this policy." My Lords, I entirely differ from the view that any such thing as the circumstances of the original loan could or ought to have affected the minds of those who were entering into this contract. I do not believe that any one of them would have thought any such thing. I will come in a moment to what it is suggested would have occurred to them as material, but I do not believe that any one would have thought that material, and the reason I say that is not that I rely upon my own judgment alone, but I look at what as a fact those business men did in reference to it. Did they inquire by a single question what were the circumstances of the original loan? Did they ask anything about the original loan, or how it came to be made? Not a word. What they did was what as business men and as sensible men would be the natural thing for them to do—they went and inquired at the bank and found out what the commercial reputation of Sir Frederick Seager Hunt was; they were satisfied with the result of their inquiries and they entered into this contract.

My Lords, it appears to me that there is the beginning and the ending of this case. There is no pretence for saying that the parties who obtained this contract with the underwriters knew and kept back anything which could have affected Sir Frederick Seager Hunt's credit, subject of course to what may be said afterwards about the nature of the loan itself, with which I will deal in a moment. To my mind that was the whole question, and on that point it appears to me to be absolutely out of the question that you can go back any further than that. It is very easy to use the phrase that they wanted "the whole transaction explained to them"; you must explain what you mean by "the transaction." If you mean the transaction of the policy, then,

as to the only thing that was guaranteed by the policy, namely, the solvency of Sir Frederick Seager Hunt, they did know all that the persons obtaining the contract themselves knew, at least so far as the evidence went, and I am not going to speculate whether if some other witness had been called and something or other had been elicited from him which we do not even now know, a different state of things might have arisen. Of things that do not appear and things that do not exist the reckoning in a court of law is the same, and it is enough for me to say that there is not a fragment of evidence which can even be pointed to here which could have affected the question of the solvency of Sir Frederick Seager Hunt.

But, my Lords, it is said that this is not an ordinary business transaction. Those words, of course, themselves require exposition—I do not know what an ordinary business transaction means. Of course the transaction itself of guaranteeing the solvency of somebody who is to be a security for somebody else's debt is, I admit, a somewhat extraordinary transaction. But that upon the surface was known to these people who entered into this bargain themselves. It is the very nature of the transaction, and that indeed might have raised suspicion in some people's minds. To my mind it would have been a somewhat odd transaction, I admit. I was not aware, until this case, that such a transaction as this, any more than the determinations of judicial tribunals, is now made the subject of policies at Lloyd's—I was not aware of that, but certainly it would have struck my mind as an odd transaction if it had come before me previously.

But then it is said now, after the liability has arisen, for which as a matter of fact the underwriters received payment (because it was a matter of payment), when they are called upon to pay, it is said: "We ought to have known the circumstances of the original loan, and if those were special circumstances applicable to the original loan, we ought to have had our minds directed to them, and then we would not have accepted such a transaction." Of course, what people persuade themselves they would or would not have done when a liability has arisen, is a thing with which one is sufficiently familiar in courts of law. If goods which have been contracted for go up or down in the market, one has heard very strange evidence about what induced people not to take the goods; and in the same way, when it has turned out that this guarantee is to be sued upon, people convince themselves in a very odd way as to what would have affected their minds if they had known it at the time.

But, my Lords, let us look a little more closely at what the underwriters themselves say. Let us take the evidence of the gentleman who is relied upon to establish the proposition that they would not have taken this guarantee if they had known that a rate of interest of 30 per cent. was charged. My Lords, I interrupt myself for a moment to say that I decline to deal with the question whether or not the loan was actually made at the time. It appears to me that that

question was never substantially raised at the trial: it is now put up as a misrepresentation. I suppose if it had been alleged that the money was not actually paid and the loan not made, but that the whole thing was agreed and arranged for, nobody could have said that there was any difference between a loan having been actually made and a loan having been agreed to be made, but it is enough to my mind to say that the question was never raised at all.

What was contended and what was put before the learned judge, who treated it much more favourably than I should have been disposed to do if I had presided at the trial, was that this rate of interest would have suggested that the transaction was so risky that they would not have entered into it. Now, obviously it is important to inquire, not what you say now, but what you said at the time. This is a question of this loan of £15,000. £15,000. was a gross sum to be paid, but it was not to be paid in the shape of so much principal and so much interest, for that time, but it was a gross sum, and therefore business men would know that if it was a loan at interest that gross sum included the interest, and if they had thought it material they would have inquired how much was interest and how much was principal to be repaid. But did they ever think of any such thing? Let me take their own evidence. At page 76 this question is asked of Mr. Burnand: "You say you naturally assumed it was at interest, but you did not ask what the interest was? A. No, I did not. Q. Did not one of the persons to whom you took the slip ask what the interest was? A. Not a single one." Out of something like fifty persons engaged in the business and familiar with business not one of them asked this question, which is now regarded as all-important, what the interest was; and in the face of that your Lordships are now asked to say that this was such an important circumstance that they would have taken a different view if they had only known that the interest was 30 per cent.

Mr. Burnand was further asked: "Do you think it was material to know what the interest was? A. It was material to know if it was 30 per cent. Q. Was it material to know what the rate of interest was? A. No, because I understood from Mr. Lion that it was a friendly thing, and I presumed they paid about 8 or 9 per cent." I will not comment again upon the friendliness of taking 8 or 9 per cent., but it seems to me that the whole tone of the witness shews, perhaps unintentionally, how perfectly idle and beside the real point was any notion as to the original loan and the terms upon which it was made. Then he is asked again: "If it was material, can you explain how it was that not one of the persons to whom that slip was taken asked the question? A. No; well, I suppose they believed the same as I did: it was a bona fide honest transaction, and, at whatever the ordinary rate is, friendly. Q. Do you mean to suggest that this is not a bona fide honest transaction? A. Well"—the witness evidently hesitated.

My Lords, once that admission was made, if this question could ever have been raised, which I doubt, as to the materiality of what took place at the original granting of the loan, it seems to me that is decisive of the whole question. Then, what is there left? It is suggested now, indeed, that the verdict is against the evidence. I think Mr. Lawson Walton went so far as to say that no reasonable jury could have found the verdict they did. I was sorry to hear him say so, because I should certainly have found the same verdict, and I am afraid the inference is unfavourable to me when I say that. I quite think that it was a reasonable verdict, and I am very much disposed to think that it is the only verdict that could have been found. I doubt whether, if the jury had found the other verdict, it would have been possible to sustain that verdict. What is put here is something that does such violence to one's common sense that if the verdict had been found the other way I doubt whether it could have been sustained.

My Lords, even the judgment of the Court of Appeal which is relied upon really does not enter into the question which has been so strongly argued before your Lordships, because what the Court of Appeal say is that other questions ought to have been asked, and they formulate two questions which they say ought to have been asked. That is disposed of by the course which was taken at nisi prius. The learned judge with great care and deliberation formulated questions and submitted them to counsel, and gave counsel time and opportunity of considering whether any other questions ought to be asked; and, after taking time for consideration, the learned counsel for the defendant stated that there was no other question which they wished the jury to be asked, nor did they wish to vary the form of the questions that were proposed to be asked. Under such circumstances it would really be putting a premium upon the loosest possible mode of conducting business to suggest that questions could be again formulated by counsel and then submitted to another jury. Under these circumstances it appears to me that it is impossible to sustain the judgment of the Court of Appeal, and I move your Lordships that that judgment be reversed.*

[Concurring opinions of Lords Morris, Shand, Brampton, and Robertson are omitted. Lords Macnaghten and Davey also concurred.]

Order of the Court of Appeal reversed; cross-appeal dismissed; judgment of Bigham, J., restored, with costs here and below.

*In the Court of Appeal ([1899], 1 Q. B. 782) it was argued that this was a contract of guaranty merely, but the court held it to be a contract of insurance. An ordinary contract of guaranty is not avoided by the innocent concealment of a material fact. See North British Ins. Co. v. Lloyd, 10 Exch. 523 (1854). As to concealment in title guaranty contracts, see Vaughan v. U. S. Title Guaranty Co., 137 App. Div. 623, 122 N. Y. Supp. 393 (1910).

SECTION 6.—WHEN DUTY TO DISCLOSE TERMINATES

MERCHANTS' MUT. INS. CO. v. LYMAN.

(Supreme Court of the United States, 1872. 15 Wall. 664, 21 L. Ed. 246.)

Lyman & Co. brought their action in the court below against the Merchants' Mutual Insurance Company of New Orleans, for the sum of $12,000, the value of the brig Sailor Boy, lost at sea on the 8th of January, 1870, and which was insured, as they allege, by the said company. Their petition set forth: That on the 30th of October, 1869, the company had issued a policy to them on the brig for the sum named, which insured her until January 1, 1870. That on the 15th December, 1869, they applied to the company to insure them in the same sum, upon the same vessel, for three months from the said 1st January, 1870. That, after taking time to consider, the company, on December 24, 1869, proposed to renew the insurance for the premium of $600 and that on December 31, the plaintiffs accepted this proposition for renewal, and that the company on that day agreed with them that it would issue the policy, and make it out and send it to them, and receive the premium. That on the 15th January, 1870, the plaintiffs sent for the policy and paid the premium, and the company issued to plaintiffs the policy annexed to the petition; that the said policy was but a compliance with and a formal statement of the agreement to renew the insurance, made December 31, 1869. That on the 8th of January, 1870, the brig was lost, etc.

Along with their petition, the plaintiffs filed two policies of insurance, on their face such as above stated; that is to say, one dated October 30, 1869, for two months, expiring January 1, 1870, and one dated January 15, 1870, and which, by its terms, purported to make an insurance "from the 1st of January, 1870, to the 1st of April, 1870."

On the trial it appeared that the plaintiffs, when they renewed the policy of the 15th January, and paid the premium for insurance, knew that the vessel was lost, and that the defendants had no such knowledge or information.

As on this state of facts it would be obvious that no action could be sustained on the *policy*—and indeed that, in point of fact, the taking of such a policy, and causing the defendant to sign it, would have been a fraud—the plaintiffs framed their petition on the assumption, and directed their evidence to the showing that the execution of the policy was but carrying into effect an agreement made before the loss of the vessel.

In order to sustain this their case they offered in evidence the deposition of their agent, which gave an account of conversations had by him in reference to a renewal of the insurance with some one in the defendants' office. The defendants objected to this testimony, on the ground that there was a written application for and contract of insurance between the parties for the same amount of insurance and same amount of premium, on the same object insured, the vessel called Sailor Boy, by the same plaintiffs as insured, and same defendants as insurers, for the same space of time, to wit, from the 1st day of January, 1870, to the 31st March, 1870; that the plaintiffs had no right to contradict the written application aforesaid by proof of a previous verbal contract; that the plaintiffs' right of action, if any, was on the written application and contract aforesaid, and that they could not ignore the said written contract to fall back on an alleged previous verbal contract of the same tenor and purport; that the evidence showing that when the said written contract was executed, the plaintiffs and their agents were aware of the fact of the previous loss and abandonment of the Sailor Boy, the said written application and policy were not binding in law, but were nevertheless the contract of the parties subject to be gainsaid by proper allegations and proof of fraud; that the plaintiffs could not ignore the written contract.

But the court ruled as follows: "The plaintiffs put their entire case upon a verbal contract to renew the insurance made, as they allege, on the 31st day of December, eight days before the loss. They admit that when they sent for the written policy, on the 15th of January, they knew of the loss, and that they could not recover on the written policy standing by itself, but they say that the real contract was made on the 31st of December, and that they had a right to go to the jury on that issue."

The court accordingly overruled the objection and admitted the testimony.[34] A verdict was given for the plaintiffs.

Mr. Justice MILLER delivered the opinion of the court.

Undoubtedly a valid verbal contract for insurance may be made, and when it is relied on, and is unembarrassed by any written contract for the same insurance, it can be proved and become the foundation of a recovery as in all other cases where contracts may be made either by parol or in writing. But it is also true that when there is a written contract of insurance it must have the same effect as the adopted mode of expressing what the contract is, that it has in other classes of contract, and must have the same effect in excluding parol testimony in its application to it, that other written instruments have.

[34] This testimony, set out in the original report, is omitted. It does not clearly show a completed contract.

Counsel for the defendants in error here, relies on two propositions, namely, that the policy, though executed January 15th, is really but the expression of a verbal contract, made the 31st day of December previous, and that the loss of the vessel between those two dates does not invalidate the contract, though known to the insured and kept secret from the insurers; and secondly, that they can abandon the written contract altogether and recover on the parol contract.

We do not think that either of these propositions is sound. Whatever may have been the precise facts concerning the negotiations for a renewal of the insurance previous to the execution of the policy, they evidently had reference to a written contract, to be made by the company.

When the company came to make this instrument, they were entitled to the information which the plaintiffs had of the loss of the vessel. If then they had made the policy, it would have bound them, and no question would have been raised of the validity of the instrument or of fraud practised by the insured.

On the other hand, if they had refused to make a policy, no injury would have been done to the plaintiffs, and they would then have stood on their parol contract if they had one, and did not need a policy procured by fraudulent concealment of a material fact at the time it was executed and the premium paid.

To permit the plaintiffs, therefore, to prove by parol that the contract of insurance was actually made before the loss occurred, though executed and delivered and paid for afterward, is to contradict and vary the terms of the policy in a matter material to the contract, which we understand to be opposed to the rule on that subject in the law of Louisiana as well as at the common law.

We think it equally clear, that the terms of the contract having been reduced to writing, signed by one party and accepted by the other at the time the premium of insurance was paid, neither party can abandon that instrument, as of no value in ascertaining what the contract was, and resort to the verbal negotiations which were preliminary to its execution, for that purpose. The doctrine is too well settled that all previous negotiations and verbal statements are merged and excluded when the parties assent to a written instrument as expressing the agreement. And it is hardly necessary to say, that the party who has destroyed the validity of that contract by his own fraud, cannot for *that reason* treat it as if it had never been made, and recover on the verbal statements made before its execution.

We may add that, as the only testimony offered to prove this parol contract was the deposition of a single witness, made part of the bill of exceptions, we do not see in that deposition sufficient evidence of a completed contract, of an agreement assented to by

both parties at any one time, to be submitted to a jury, even if the written contract had never been executed.

Judgment reversed, with directions to grant a new trial.[35]

[35] For the general proposition that the duty on the part of the insured to disclose terminates as soon as the insurer becomes equitably bound to issue a policy, see the following cases: Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co., 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277 (1892); Mutual Life Ins. Co. of New York v. Thomson, 94 Ky. 253, 22 S. W. 87 (1893); Commercial Ins. Co. v. Hallock, 27 N. J. Law, 645, 72 Am. Dec. 379 (1858); Keim v. Home Mut. Fire & Marine Ins. Co., 42 Mo. 38, 97 Am. Dec. 291 (1867); Baldwin v. Chouteau Ins. Co., 56 Mo. 151, 17 Am. Rep. 671 (1874). In Cory v. Patton, L. R. 7 Q. B. 304 (1872), s. c. on appeal L. R. 9 Q. B. 577 (1874), the court went so far as to hold that the duty of the insured to communicate material facts in his knowledge terminates with a preliminary contract that is binding only as a moral obligation, by reason of a custom among underwriters. Accordingly, when the insured failed to disclose to the insurer a loss that had occurred after making such an imperfect preliminary contract, but before the execution of the policy, it was held that the concealment was not ground for avoiding the policy when issued.

CHAPTER V

REPRESENTATIONS

SECTION 1.—MARINE INSURANCE

OF REPRESENTATIONS.

(Marshall on Insurance [1802] p. 334.)

Good faith should preside in all the transactions of commerce, and in none more than in those of insurance, of which it is the vital principle. In this contract, each party is bound to conduct himself towards the other, not only with integrity, but with the most unreserved openness and candor; and they ought mutually to disclose to each other every circumstance which can in any degree affect the risk. It seldom happens that any such circumstance lies within the knowledge of the underwriter; fraud is therefore seldom imputable to him, and he is much oftener the victim of his own credulity. But the law watches, with a jealous eye, the conduct of the insured, from whom the underwriter must, in most cases, learn all the facts and circumstances from which he makes his calculations, and appreciates the risk. Every material representation is considered as forming an ingredient in the contract, and every material misrepresentation or concealment is therefore deemed a fraud, and will avoid it.

ANONYMOUS.

(Court of King's Bench, 1692. Skinner, 327.)

Upon evidence in an action upon a charter party, the case was, that J. S. insured for him, and such who should have goods upon such ship; and A. B. brought an action upon this charter-party, and made averment he had goods upon the ship, and held good; but per Holt, Chief Justice, if the goods were assured as the goods of an Hamburgher who was an ally, and the goods were the goods of a Frenchman who was an enemy; this is a fraud, and the assurance is not good.

PAWSON v. WATSON.

(Court of King's Bench, 1778. 2 Cowp. 785.) [1]

Upon a rule to shew cause why a new trial should not be granted in this case, Lord Mansfield reported as follows: This was an action upon a policy of insurance. At the trial it appeared in evidence, that the first underwriter had the following instructions shewn him: "Three thousand five hundred pounds upon the ship Julius Cæsar, for Halifax, to touch at Plymouth, and any port in America: She mounts 12 guns and 20 men." These instructions were not asked for or communicated to the defendant; but the ship was only represented generally to him, as a ship of force: And a thousand pounds had been done, before the defendant did any thing upon her. The instructions were dated the 28th June, 1776, and the ship sailed on the 23d July, 1776; and was taken by an American privateer. That at the time of her being taken, she had on board 6 four pounders, 4 three pounders, 3 one pounders, 6 half pounders, which are called swivels, and 27 men and boys in all, for her crew; but of them, 16 only were men, (not 20, as the instructions mentioned), and the rest, boys. But the witness said, he considered her as being stronger with this force, than if she had 12 carriage guns and 20 men: He also said, (which is a material circumstance), that there were neither men nor guns on board, at the time of insurance. That he himself insured at the same premium, without regard or enquiry into the force of the ship. Other underwriters also insured at the same premium, without any other representation than that she was a ship of force. That to every four pounder there should be five men and a boy. That in merchant ships, boys always go under the denomination of men.

This was met by evidence on the part of the defendant, saying, that guns mean carriage guns, not swivels, and men mean able men exclusive of boys. There were three causes of the same nature, depending upon the same evidence: The defence in each was, that these instructions were to be considered as a warranty, the same as if they had been inserted in the policy; though they were not proved to have been shewn to any but the first underwriter. In all the three cases, the question reserved for the opinion of the court is, "Whether the written instructions which were shewn to the first underwriter, are to be considered as a warranty inserted in the policy, or as a representation, which would only avoid the policy, if fraudulent?" If the court should be of opinion, that the instructions amounted to a warranty, then a new trial is to be granted in each, without costs; otherwise, the verdicts are to stand.

At the trial I was of opinion, that it would be of very dangerous

[1] S. c., 1 Doug. 11, note 3.

consequence to add a conversation that passed at the time, as part of the written agreement. It is a collateral representation: And if the parties had considered it as a warranty, they would have had it inserted in the policy. But secondly, if these instructions were to be considered in the light of a fraudulent misrepresentation, they must be both material and fraudulent: And in that light, I held, that a misrepresentation made to the first underwriter, ought to be considered as a misrepresentation made to every one of them, and so would infect the whole policy. Otherwise, it would be a contrivance to deceive many: For where a good man stands first, the rest underwrite without asking a question; and if he is imposed upon, the rest of the underwriters are taken in by the same fraud. The case was left to the jury under that direction.

Mr. Wallace, who shewed cause, insisted that the instructions in question were no warranty, but a representation. That the policy is the formal instrument containing the final agreement of the parties; and therefore no instructions, parol or written, can be admitted to contradict it. 2. With respect to its being a fraudulent misrepresentation, the evidence proved, and the jury by their verdict found there was no fraud. On the contrary, the terms of the representation were more than complied with: For by the evidence it clearly appears, that the force actually on board, exceeded the force specified in the instructions. Therefore, he prayed the rule might be discharged.

Mr. Mansfield, Mr. Macdonald, and Mr. Davenport, contra, in support of the rule, contended, that the instruction in question, being contained in the same paper as that which named the ship and captain, were the basis of the agreement between the parties; therefore, most clearly to be considered as a warranty: Without it, there was no agreement at all. There was no ship, no subject upon which the policy could attach. If not intended as the foundation and ground of the insurance, why write down a specific force? Why not state only, that she was a ship of force generally, unless that the real force she was to carry might be correctly understood? If there is a writing, whether inserted in the instrument or in any collateral paper, or whether a warranty technically so called or not, makes no difference. It is equally the basis of agreement between the parties; therefore in strictness, it ought to be complied with. Suppose there had been no guns at all, could the plaintiff have recovered in that case? Yet evidence of that, would have been as much a contradiction to the policy, as this, for no mention is made of guns in the policy. Or, suppose it had been written in the margin of the policy, could the policy have stood? Clearly it could not.

With respect to the necessity of the representation being material, as well as fraudulent, whether material or not does not depend upon the opinions of particular persons upon the particular case in question; but whether the subject itself is, in its nature material. If

the ship had been described to be of a particular colour, clearly that would have been no engagement, because in its nature immaterial. But guns in time of war are in their own nature material; and indeed of the very essence of a policy: For the premium is regulated accordingly. It is not enough to say, that in the opinion of two or three persons, the force actually on board was equal. The insurer alone is to be the judge of that. But that is not the point. Whether she was in a better or worse state, the underwriter has a right to say, the truth of the case is not according to what I bargained for, and therefore there is no contract between us. Upon these grounds they prayed the rule might be made absolute.

Lord MANSFIELD asked, Whether there was any case that made a difference between a written and a parol representation? Upon receiving no answer, his Lordship proceeded to give his opinion as follows:

There is no distinction better known to those who are at all conversant in the law of insurance, than that which exists, between a warranty or condition which makes part of a written policy, and a representation of the state of the case. Where it is a part of the written policy, it must be performed: As If there be a warranty of convoy, there it must be a convoy: Nothing tantamount will do, or answer the purpose: It must be strictly performed, as being part of the agreement; for there it might be said, the party would not have insured without convoy. But as, by the law of merchants, all dealings must be fair and honest, fraud infects and vitiates every mercantile contract. Therefore if there is fraud in a representation, it will avoid the policy, as a fraud, but not as a part of the agreement. If, in a life policy, a man warrants another to be in good health, when he knows at the same time he is ill of a fever, that will not avoid the policy; because by the warranty he takes the risk upon himself. But if there is no warranty, and he says, "The man is in good health," when in fact he know him to be ill, it is false. So it is, if he does not know whether he is well or ill; for it is equally false to undertake to say that which he knows nothing at all of; as to say that is true, which he knows is not true. But if he only says, "He believes the man to be in good health," knowing nothing about it, nor having any reason to believe the contrary; there, though the person is not in good health, it will not avoid the policy, because the underwriter then takes the risk upon himself. So that there cannot be a clearer distinction, than that which exists between a warranty which makes part of the written policy, and a collateral representation, which, if false in a point of materiality, makes the policy void: but if not material, it can hardly ever be fraudulent. So far from the usage being to consider instructions as a part of the policy, parol instructions were never entered in a book, nor written instructions kept, till many years ago, upon the occasion of several actions brought by the insured upon policies, where the brokers had

represented many things they ought not to have represented, in consequence of which the plaintiffs were cast; I advised the insured to bring an action against the brokers, which they did, and recovered in several instances: and I have repeatedly, at Guild-hall, cautioned and recommended it to the brokers, to enter all representations made by them in a book. That advice has been followed in London: But it appeared lately, at the trial of a cause, that, at Bristol, to this hour, they make no entry in their books, nor keep any instructions.

The question then is, "Whether in this policy, the party insuring has warranted that the ship should positively and literally have twelve carriage guns and twenty men?" That is, "Whether the instructions given in evidence are a part of the policy?" Now, I will take it by degrees. The two first underwriters before the court, are Watson and Snell. Says Watson, "It is part of my agreement, that the ship shall sail with twelve guns and twenty men; and it is so stipulated, that nothing under that number will do. Ten guns with swivels will not do." The answer to this is, "Read your agreement; read your policy." There is no such thing to be found there. It is replied, Yes, but in fact there is, for the instructions upon which the policy was made, contain that express stipulation. The answer to that is, that there never were any instructions shewn to Watson, nor were any asked for by him. What colour then has he to say, that those instructions are any part of his agreement. It is said, he insured upon the credit of the first underwriter. A representation to the first underwriter, has nothing to do with that which is the agreement, or the terms of the policy. No man who underwrites a policy, subscribes, by the act of underwriting, to terms which he knows nothing of. But he reads the agreement, and is governed by that. Matters of intelligence, such as that a ship is or is not missing, are things in which a man is guided by the name of a first underwriter, who is a good man, and which another will therefore give faith and credit to; but not to a collateral agreement, which he can know nothing of. The absurdity is too glaring, it cannot be. By extension of an equitable relief in cases of fraud, if a man is a knave with respect to the first underwriter, and makes a false representation to him in a point that is material; as where having notice of a ship being lost, he says she was safe; that shall affect the policy with regard to all the subsequent underwriters, who are presumed to follow the first. How then do Watson and Snell underwrite the ship in question? Without knowing whether she had any force at all. That proves the risk was equal to a ship of no force at all; and the premium was a vast one—eight guineas.

So much therefore for those two cases. The third case is that of Ewer, who saw the instructions, with the representation which they contained. Did the number of guns induce him to underwrite the

policy? If it did, he would have said, "Put them into the policy; warrant that the ship shall depart with twelve guns and twenty men." Whereas, he does no such thing, but takes the same premium which Watson and Snell did, who had no notice of her having any force. What does that prove? That he is paid and receives a premium, as if it were a ship of no force at all. The representation amounts to no more than this, "I tell you what the force will be, because it is so much the better for you." There is no fraud in it, because it is a representation only of what, in the then state of the ship, they thought would be the truth. And in real truth, the ship sailed with a larger force: For she had nine carriage guns, besides six swivels. The underwriters, therefore, had the advantage by the difference. There was no stipulation about what the weight of metal should be. All the witnesses say, "She had more force than if she had had twelve carriage guns, both in point of strength, of convenience, and for the purpose of resistance." The supercargo in particular says, "He insured the same ship and the same voyage, for the same premium, without saying a syllable about the force." Why then it was a matter proper for the jury to say, Whether the representation was false? or Whether it was in fact an insurance, as of a ship without force? They have determined, and I think very rightly, that it was an insurance without force.

Ewer makes an objection that the representation ought to be considered as inserted in the policy; but the answer to that is, he has determined whether it should be inserted in the policy or not, by not inserting it himself. There is a great difference, whether it shall be considered as a fraud. But it would be very dangerous to permit all collateral representations to be put into the policy. I am extremely glad to hear that a great many of the underwriters have paid. Mr. Thornton has paid, who was the first person that saw the instructions. Shall the rest refuse then? As to Watson and Snell, they have no pretence to refuse, for there is not a colour for the objection made by them. As to Ewer, we are all satisfied with the determination of the jury against him. Therefore, the rule for a new trial must be discharged.

N. B. On the Monday following, Mr. Davenport said, he was desired by the underwriters to ask, Whether it was the opinion of the court, that to make written instructions valid and binding as a warranty, they must be inserted in the policy?

Lord MANSFIELD answered, that most undoubtedly that was the opinion of the court. If a man warrants that a ship shall depart with twelve guns, and it departs with ten only, it is contrary to the condition of the policy.

BIZE v. FLETCHER.

(Nisi Prius, 1779. Park, Ins. [3d Ed.] 202; s. c. 1 Doug. 284.)

This was an action on a policy of insurance on the ship Carnatic, East Indiaman, "at and from Port L'Orient, to the isles of France and Bourbon, and to all or any ports or places, where, and whatsoever, in the East Indies, China, Persia, or elsewhere, beyond the Cape of Good Hope, from place to place; and during the ship's stay and trade, backwards and forwards, at all ports and places, and until her safe arrival back at her last port of discharge in France." But at the same time that this policy was subscribed, there was a slip of paper wafered to it, and shewn to the underwriters, on which was written the following representation: "The ship has had a complete repair, and is now a fine and good vessel, three decks. Intends to sail in September or October next (1776.) Is to go to Madeira, the isles of France, Pondicherry, China, the isles of France, and L'Orient."

The ship did not sail till the 6th of December, 1776, and did not reach Pondicherry till the 23d of July, 1777. She continued there till the 23d of August following, when, instead of proceeding to China, she sailed for Bengal, where having passed the winter and undergone considerable repairs, she sailed from thence early in the year 1778, (being the second ship that left the Ganges;) returned to Pondicherry, and after taking in a homeward-bound cargo at that place, proceeded in her voyage back to L'Orient, but was taken in October of that year, by the Mentor privateer. The usual time, in which the direct voyage between Pondicherry and Bengal is performed, is six or seven days; but the Carnatic was about six weeks in going to Bengal, and two months on the way back from thence to Pondicherry. Both going and returning, she either touched at, or lay off, Madras, Masulipatum, Visigapatam, and Yanon, and took in goods at all those places.

It was contended in this cause, at the trial, that the representation accompanying the policy restrained the voyage to the limits therein specified. They produced some letters from the owners to their correspondents, one of which was to the following effect: "We doubt not, but on account of the storm, the ship will be forced to go to Bengal to be laid down, which cannot be done at Pondicherry; in which case, our captain will have entered a protest, which we will forward in time to you." In a subsequent letter, they say nothing of the storm or leak; but mention a different cause for the ship's going to Bengal. These letters, it was said, raised a presumption, that the necessity of going to Bengal was merely a pretense devised after the capture, and when the insured began to apprehend that the words of the policy would not cover a voyage to that place.

Lord MANSFIELD told the jury: "That the first question was,

whether the policy was void, on account of misrepresentation. Now there is an essential difference between a warranty and a representation. The warranty is a part of the contract; a risk described in the policy is part of the contract. There can be no warranty by any collateral representation. The ground, on which a representation affects a policy, is fraud. The representation must be fraudulent, that is, it must be false and material in respect to the risk to be run. All risks are governed by the nature of them; and the premium is governed by the risk. Where a representation accompanied an instrument, it says, 'I will have this understood as my present intention: but I will have it in my power to vary it.' The great question in this cause is, whether the representation was false, and that in a material instance. Fraud is found out by the materiality of the point it is charged in. It is to be considered then, whether they had really a view of going to China. A witness has proved that the difference of insurance is one per cent. on going to Bengal, and not to China. If you think that this was a misrepresentation to avoid paying the one per cent. you will find for the defendant. But if you are satisfied that the real intention, at the time of the representation, was to go to China, the plaintiff will be entitled to your verdict: for the insured may change his intention, go to Bengal, and yet be protected by the policy, which clearly admits of that voyage, and must be understood by both parties in a greater latitude than the representation, being expressed in different and much more comprehensive terms. If, upon the whole evidence, you shall be of opinion, that no fraud was intended, and that the variance between the intended voyage, as described in the slip of paper, and the actual voyage as performed, did not tend to increase the risk to the underwriters, this slip of paper being only a representation, you must find for the plaintiff."

The jury found a verdict accordingly.

McDOWELL v. FRASER.

(Court of King's Bench, 1779. 1 Doug. 260.)

This was an action upon a policy of insurance on the ship the "Mary and Hannah, from New York to Philadelphia." At the time when the insurance was made, which was in London, on the 30th of January, the broker represented the situation of the ship to the underwriter as follows: "The Mary and Hannah, a tight vessel, sailed with several armed ships, and was seen safe in the Delaware on the 11th of December, by a ship which arrived at New York." In fact, the vessel was lost on the 9th of December, by running against a chevaux de frise, placed across the river. The cause came on to be tried before Lord Mansfield, at the last sittings at Guildhall. The defence

was founded on the misrepresentation as to the time when the ship was seen; and the representation and the day of the loss being proved, the jury found for the defendant. On Monday, the 8th of November, Dunning obtained a rule to shew cause, why there should not be a new trial, which came on to be argued this day.

The Solicitor General and Dunning, for the plaintiff. Lee and Davenport, for the defendant.

On the part of the plaintiff, the difference between a warranty and a representation was much enlarged upon. It was admitted, that the representation in this case was false in point of fact, though the insured, at the time, believed it to be true. It was also admitted, that a representation, if false, in a material point, annuls the contract. But it was contended, that the particular day when the ship had been seen in the Delaware was not material. That the meaning of the representation was to inform the underwriter, that the ship had got safe through two thirds of her voyage from New York, and beyond the reach of capture. What was stated as to that material part was perfectly true, and that was all that was necessary, as was decided in the cases on the insurance of the Julius Cæsar.[2] If the representation had been, that she had been seen on the 8th or 9th in the Delaware, it would have made no difference in the premium. There might have been circumstances which would have rendered the day material, as a bad storm on the 9th or 10th; but there was nothing of that sort in this case. An intentional misrepresentation was not imputed to the insured. The manner in which the mistake arose was this: The captain who had met the ship said, that he had seen her on the fifth day after her departure from New York. It seems a ship is said to sail from New York indifferently, either when she sails from the quay at New York, or from Sandy Hook. When the captain mentioned her departure from New York, he was understood to mean from Sandy Hook, and it was known that she had sailed from thence on the 6th; but it turned out that he meant to speak of her departure from the quay, which was some days before.

For the defendant, it was urged, that the materiality of the fact misrepresented was before the jury, and that they had exercised their judgment upon it, and determined by their verdict, that it was material.

Lord Mansfield. The distinction between a warranty and a representation is perfectly well settled. A representation must be fair and true. It should be true as to all that the insured knows; and, if he represent facts to the under-writer, without knowing the truth, he takes the risk upon himself. But the difference between the fact as it turns out, and as represented, must be material. The case of the Julius Cæsar was very different from this. The ship, there, was only fitting out when the insurance was made. No guns nor men

[2] Pawson v. Watson, 2 Cowp. 785, ante, p. 318.

were put on board. It was only said what was meant to be done, and what was done, though different, was as advantageous, or more so, than what had been represented. There was no evidence of actual fraud in the present case, and no question of that sort seemed to be made. But there was a positive averment, that the ship was seen in the Delaware, on the 11th of December. The underwriter was deceived as to that fact, and entered into the contract under that deception. There was no evidence at the trial when she was seen in the Delaware, or in what condition; but, suppose the fact had been explained in the manner now suggested, why did the insured take upon him to compute the day of the month on which she had been seen? Why did he not mention exactly what his information was, and leave the underwriter to make the computation? In insurances on ships at a great distance, their being safe up to a certain day, is always considered as a very important circumstance. I am of opinion, that the representation concerning the day was material.

Willes, Justice. This is certainly only a representation; but, in an insurance on so short a voyage, it might have made a material difference whether the ship was known to be safe two days sooner or later. It ought to have been shewn, on the part of the plaintiff, that it was not material, but there was no evidence that the ship was met on the 9th, or any other day. The materiality was proper for the consideration of the jury.

Ashhurst, Justice. The distinction which the court has made in the cases on the Julius Cæsar, and some others, between a representation and a warranty, is extremely just. There is no imputation of fraud in this case; but the insured should have been more cautious. In the former cases the representation was of what was intended; here, it was of a fact, stated as having happened within the knowledge of the insured. He should have made the representation in the same words in which the intelligence is said to have been communicated to him.

Buller, Justice. We cannot say the difference of the day was not material. The safety of the ship is the most material fact of any, in cases of insurance. The plaintiff admits, that the place where she was met in safety was material. Why was not the time equally so? There was no intentional deceit, and it is perhaps unfortunate that the insured made the mistake; but I think the verdict right.

The rule discharged.

BARBER v. FLETCHER.

(Court of King's Bench, 1779. 1 Doug. 305.)

This was an action on the same policy with Barber v. French,[3] tried at the same time, the same rule entered into, and a similar verdict found; but here, besides the ground mentioned in that case, there was another stated, viz. that, since the trial, a material representation which had been made to Shulbred the first underwriter on the policy, and which turned out to be false, had been discovered. After the other case was disposed of, this stood over, on this point, till an affidavit of the fact should be procured from Shulbred.

Cause was this day shewn, when it appeared, from Shulbred's affidavit, that, when he signed the policy, in March, 1778, the broker was getting several others, on other ships, subscribed at the same time, all belonging to the same owner, and said, speaking of them all—"Which vessels are expected to leave the coast of Africa in November or December, 1777." In truth, the vessel in question had sailed in May, 1777, and Shulbred swore, in his affidavit, that, if he had known that circumstance, he would not have signed. There had been actions brought against all the underwriters on the policy, except Shulbred.

Davenport, for the defendant, insisted, that a representation to the first underwriter is considered as made to all who sign after him; and that the representation here was material, or at least such as ought to be submitted to a jury, for them to judge of its materiality.

Lord MANSFIELD. It has certainly been determined, in a variety of cases, that a representation to the first underwriter extends to the others. But under what circumstances has the defendant gone to trial in this case? He certainly knew what had been represented to himself. He was acquainted with Shulbred, and had an opportunity of asking before the trial what had been represented to him. If therefore this evidence is new, it is owing to his own negligence. But the representation is not material. It was only an expectation, and the underwriters did not inquire into the ground of the expectation. This was lying by till after a trial, in order to make an objection if the verdict should be for the plaintiff.

The rule discharged.

[3] 1 Doug. 281.

FILLIS v. BRUTTON.

(Nisi Prius, 1782. Park, Ins. [3d Ed.] 182.)

The policy was on the brig Richard at and from Plymouth to Bristol. Several letters passed between the plaintiff and the broker, who effected the policy, as to the premium at which the insurance could be made; at last, it was underwritten at four guineas per cent. The broker's instructions stated the ship ready to sail on the 24th of December. The broker represented to the underwriter, that the ship was in port, when in fact she had sailed the 23rd of December.

Lord MANSFIELD said "that this was a material concealment and misrepresentation." The jury, however, hesitated; his Lordship then laid down the following as general principles: "In all insurances, it is essential to the contract, that the assured should represent the true state of the ship to the best of his knowledge. On that information the underwriters engage. If he state that as a fact, which he does not know to be true, but only believes it, it is the same as a warranty. He is bound to tell the underwriters truth. In the present insurance, the only material point is this: Had the ship sailed, or was she in port?"

Upon this, the jury found for the defendant.

EDWARDS v. FOOTNER.

(Nisi Prius, 1808. 1 Camp. 530.)

This was an action on a policy of insurance on goods in the Fanny, from London to Hayti.

The ship was captured, by a French privateer, with the goods on board; and the question was, whether the underwriters were discharged by a representation concerning her equipment.

It appeared, that about a week before the policy was signed, the names of the underwriters were put down upon a slip, when the broker stated to the defendant, "that the Fanny was to sail with the Hopewell and Young Roscius, both armed ships, and that she was herself to carry ten guns and twenty-five men." There was no evidence of any conversation upon the subject having passed between the parties either when the policy was signed, or in the intervening period. In fact, the Fanny sailed by herself, and carried only eight guns and seventeen men.

Topping, for the plaintiff, contended, that the ship was sufficiently equipt to be seaworthy, and that what was said when the defendant's name was put upon the slip, could not be considered as a representation which the assured were bound to comply with, as the slip was no evidence of the contract, and the court could

only look to what took place when the policy was subscribed. This very point had been lately decided in Dawson v. Atty, 7 East, 367, where it was held, that although the broker, when the slip was subscribed, had said that the ship was an American, yet, as he had not represented her to be of any particular country at the time when the policy was subscribed, she did not require to be documented as an American, and, although she was captured for want of a certificate required by a treaty between the government of the captors and the United States of America, the owner of the goods recovered against the underwriters.

Lord ELLENBOROUGH. If a representation is once made, it is to be considered as binding, unless there is evidence of its being afterwards altered or withdrawn. In the case cited, the vessel was stated to be an American when the slip was made out; but when the policy came to be signed, the broker said generally, "that it was an insurance on goods in the Hermon," without describing her as of any particular country. There, the first conversation was qualified and controlled by what followed. But here there is no evidence of any conversation upon this subject between the parties subsequently to the statement that the ship was to carry 10 guns and 25 men; and this having taken place when the insurance was talked of, and the terms of it were agreed upon, it must be referred to the policy, and treated as a representation which required to be substantially complied with on the part of the assured.

Verdict for the defendant.

DENNISTOUN, BUCHANAN & CO. v. LILLIE.

(House of Lords, 1821. 3 Bligh, 202.)

Upon the 17th of June, 1814, the appellants, Messrs. Dennistoun, Buchanan and Company, merchants in Glasgow, received a letter of advice from Messrs. William Duff and Company, their correspondents at New Providence, dated 2d April, 1814, containing copies of their letters to the appellants of the 19th and 24th of March preceding.

The following are extracts of such parts of the letters as relate to the subject of insurance: By the letter of the 19th March the appellants are informed thus: "At a prize sale of a South Sea whaler and her cargo of oil, that took place here yesterday, we purchased on your account about 40,000 gallons of spermaceti oil, at 3s. 9½d. sterling per gallon; 14,000 gallons of which we intend to ship upon that remarkable fast-sailing schooner Brilliant, of 157 tons burthen, mounting six nine-pounders, to sail, with or without convoy, about the first of May; and on the value of which shipment you will please to make insurance. Messrs.

Seton and Elliot will ship on board the Jessie 60,000 lbs. St. Domingo coffee, which they wish you to have insurance done for at 50s. per 100 lbs., and 17,000 lbs. Cuba coffee, at 60s. per 100 lbs. They also wish you to have insurance effected on the Brilliant from hence to Greenock, valuing her at £1,400. sterling; to all of which we beg your attention." The letter of the 24th says that the Brilliant would be cleared out as bound to Greenock and a port on the Continent. And in the letter of 2d April Messrs. Duff and Company state, towards the conclusion of the letter, which relates to a variety of other matters: "The Brilliant will sail on the 1st of May, a running vessel, in which the writer of this will take his passage."

Upon these advices an insurance was effected, on ship and goods, on the 18th of June, being the day after receiving the letters above quoted, although the contract or policy bears date on the 21st of June, three days later. At the time of entering into the contract the letters of advice were shown to the respondents, who were some of the underwriters at Glasgow, with whom the insurance was effected.

The terms of the policy were: "From Nassau to Clyde, with leave to call at all ports and places whatsoever, for convoy, or for any other purpose whatever, without being deemed a deviation; and with or without letters of marque, leave to chase, capture, man and convoy, or send into port or ports, any vessel or vessels."

The insurance was done at the rate of six guineas per cent., to return three pounds per cent. "for convoy for the voyage, or two pounds per cent. for partial convoy and arrival."

About the 20th of April His Majesty's ship Martin came into the harbour of Nassau, and being bound for Halifax, the commander offered to take the Brilliant under his protection. This being considered a great advantage, as the risk of capture between Nassau and Halifax was imminent, extraordinary exertions were used to complete the loading of the Brilliant, and she sailed under convoy of the Martin on the 23d of April, being about eight days earlier than the date of sailing proposed in the foregoing letters.

Upon the 11th of May the Brilliant was captured by an American privateer, and carried into Boston.

When the intelligence of the capture arrived, the appellants applied to the underwriters, and many of them settled the loss. But the respondents resisted payment; whereupon the appellants brought an action before the Court of Admiralty, concluding for payment of the sums respectively underwritten for them; and, after the usual pleading, the Judge Admiral pronounced the following interlocutor:

"The Judge Admiral, having advised the libel, defences, answers, replies, and writings produced, finds, that by a letter, dated the

19th of March, 1814, from William Duff and Company, the correspondents of the pursuers, of New Providence, to them, they mentioned the ship Brilliant, a remarkable fast-sailing schooner, was to sail, with or without convoy, about the 1st of May; and that by an after letter dated the 2d of April last, 1814, the incorrectness of the word 'about,' as applicable to the 1st of May, was explained by the same correspondents informing the pursuers that the Brilliant was to sail for New Providence on the 1st of May, a running vessel, 'and in which the writer of this (William Duff) will take his passage:' Finds it admitted, that these letters were communicated to the defenders, whereby they saw that the vessel was positively intended to remain in New Providence, and not to sail therefrom till the 1st of May last, and under this impression subscribed the policy in question: Finds, that the Brilliant sailed on the 23d of April from New Providence, and, for any thing known, may have been captured before the first day of May, when she was held forth to the defenders as remaining in the harbour: Finds, therefore, that although the representation made by the pursuers was absolutely innocent on their part, the fact stated by them to the defenders was not verified, and a material change was thereby made in the risk undertaken by the latter; and therefore assoilzies the defenders, and finds them entitled to expenses."

The appellants brought the foregoing interlocutor under review of the Judge Admiral, by petition, and the interlocutor thereon was:

"The Judge Admiral having advised this petition, and another dated 23d February last, with the writings produced, remains of the same opinion, that the risk which the underwriters undertook, being confessedly that on a vessel to sail on the 1st of May, was perfectly different from one on a vessel which sailed on the 23d April, inasmuch as the defenders undertook a risk on a vessel understood to be in the harbour, and safe on the 1st of May, when in fact she had been eight days at sea. Refuses this petition, and adheres to the interlocutor complained of."

"Note.—The petitioners do not seem to dispute, that if the vessel had been taken before the 1st of May they would have had no argument. They however state that the vessel was not captured till 11th May. This, in real reasoning, makes no difference, since it is a thousand chances to one that if she had not sailed till 1st May she would not have fallen in with the vessel which took her. The case of a vessel sailing the day before she is represented to sail is quite different from that of a ship being detained by unavoidable accidents beyond that day. In fact, it is an insurance on a vessel in jeopardy, when she is represented to be comparatively safe." And on the 19th of April, 1815, the Judge Admiral

modified the defenders account of expenses to £10. 1s. 4½d., and decerned against the appellants for payment of the same, and for the fees of extracting the decree.

The appellants pursued an action of reduction before the Lords of Council and Session of the foregoing interlocutors pronounced by the Judge Admiral. This action was discussed before Lord Pitmilly, Ordinary, who pronounced an interlocutor, repelling the reasons of reduction, etc.

The appellants submitted the question to review in a representation, to which answers were given in; but the Lord Ordinary adhered to the interlocutor.

The appellants then brought these interlocutors under review of the Second Division of the Court of Session by a petition. The Lords adhered to the interlocutors complained of, etc.

The appeal was against the foregoing interlocutors.

On the part of the appellants distinctions were taken between a warranty and a representation,[4] and it was contended that the letters exhibited did not amount to a warranty, or anything more than a representation, which was not material; and that the statement of a future event, as an intended day of sailing, can be no more than an expectation. Bowden v. Vaughan, 10 East, 415; Hubbard v. Glover, 3 Camp. N. P. C. 313; Barber v. Fletcher, Doug. 305 (in this case the word "expected" was used); Bize v. Fletcher, Doug. 271. See also Park, p. [313]. It was further argued, that the representation not being made mala fide, the policy was not vitiated by such a misrepresentation.

For the respondents it was contended, 1. That the day of sailing was a fact material to the risk, and being within the control of the appellants, a statement of intention was equivalent to a statement of fact. 2. That the vessel having sailed on the 23d of April, was, at the time when the insurance was effected, what is termed "a missing ship." Ratcliffe v. Shoolbred, Park, 180; Marshall 1, 468; Fillis v. Brutton, Park, 182; Marshall, 467.

[In the course, and at the conclusion of the argument, the Lord Chancellor[5] made the following observations:]

The second letter, in which it is expressed that the vessel will sail on the 1st of May, was shown to the underwriters, and is it not the same thing whether the party means to misrepresent, or whether the thing actually communicated is a misrepresentation? The authorities turn upon the difference between expectation and representation. In the case of Barber v. Fletcher the representation is, that the ship is expected to sail. If the accuracy of a

[4] Pawson v. Watson, Cowper, 790; Park on Ins. c. 10, pp. 203, 205; Id. c. 18, pp. 321, 322; Marsh. on Ins. c. 9, § 2, p. 342.—*Rep.*

[5] Lord Eldon.

representation as to time is to be given up, that doctrine must apply equally to the question of place. The letter of the 2d of April speaks in terms of uncertainty as to the sailing of the Dart and the Jessie, but as to the Brilliant the statement is positive. Do the appellants carry their arguments so far as to assert, that in cases which go beyond expectation, where there is a misrepresentation of a material fact, without a warranty or mala fides, the policy, according to the authorities, is not vacated? In the case of such a misrepresentation, mala fides is not necessary to render the contract inoperative. The principle of the judgment is the same in all the cases, although we cannot agree in all the decisions. The principle, and the application of the principle, are different things. To maintain the argument for the appellant it is necessary to contend, that if the vessel had been captured on the 24th of April the underwriters would have been liable.

The Lord Chancellor. This case resolves itself into two questions: First, whether the representation was made, of which there is no doubt; and secondly, whether it is a representation of an expectation, or a statement as of a past fact, which is material to the risk.

I have formed an opinion upon the subject, but wish to give it further consideration; and this is the more necessary, as this branch of law is not well understood in Scotland. The case is to be determined upon a consideration of the facts, as a jury would decide under the direction of a judge as to the law applicable to those facts. The question for a jury would be, Was there in this case a misrepresentation of a material fact affecting the risk covered by the policy.[6]

The Lord Chancellor. In the absence of the noble Lord,[7] who was present at the hearing of this appeal, and by his desire, I suggest, that upon inspection of the policy of insurance (which is not sufficiently stated in the printed cases), it appears to be a policy upon the ship as well as goods. It is not therefore like the case of Bowden v. Vaughan, which was cited on the argument. In that case the policy was effected by the owner of goods, and on goods only. If there should be any desire to make further observations on the matter of the policy, they may be suggested at the meeting of the House on Wednesday.

5th April, 1821.—The Lord Chancellor [after stating the question on the appeal]. There is a difference between the representation of an expectation and the representation of a fact. The former is immaterial; but the latter avoids the policy if the

[6] Before the motion for judgment was finally made, the Lord Chancellor intimated that the House would (if desired) hear a further argument on the terms of the policy; but the proposal was declined by the agents.

[7] Redesdale.

fact misrepresented be material to the risk. After the most attentive consideration of the case it appears to me that the judgment of the court below is right.

Judgment affirmed.[8]

FLINN v. TOBIN.

(Nisi Prius, 1829. Moody & M. 367.)

Assumpsit on a policy of insurance on the ship Andromache.

The defence arose on an alleged misrepresentation. It was stated on the part of the defendant, that the first underwriter on the policy, on being asked to effect an insurance on the ship, had inquired what cargo she was to take, and on being told that she was to have a cargo of rock salt, had refused to insure her, considering that a very dangerous and laborious cargo for a vessel of her quality: that the broker had then gone away to make further inquiries, and returned, stating that she would only take fifty or sixty tons of rock salt, which would put her in light ballast trim: and that the underwriter had then consented to insure her. The precise date of this representation was not fixed, though some evidence was given with a view to show that it was made on the day on which the policy was signed. The ship sailed the day after the policy was signed, with a cargo of 160 tons of rock salt, being a full and very heavy cargo; and was lost. It appeared in evidence on the part of the plaintiff, that the freighters of the ship had required a certificate from a ship-builder that she was fit to carry such a cargo as that shipped on board her, and had received a certificate that she was "fit to carry a cargo of rock salt;" and that this certificate was given several days before she sailed: and some evidence was given, tending to show that it was communicated to the first underwriter before he signed the policy, and that no other representation was made as to the cargo.

Lord TENTERDEN, C. J., in summing up, said: I think the defendant in this case will not be entitled to a verdict, unless he satisfy the jury that there was a fraudulent misrepresentation of the cargo which the Andromache was to carry. If he does so, the plaintiff cannot recover: but the mere fact of a misrepresen-

[8] The principal case is explained and defended by Gray, J., in Kimball v. Ætna Ins. Co., 9 Allen (Mass.) 540, 85 Am. Dec. 786 (1865), and also in Rice v. New England Marine Ins. Co., 4 Pick. (Mass.) 439, 442 (1827). It is disapproved in Alston v. Mechanics' Mut. Ins. Co. of City of Troy, 4 Hill (N. Y.) 329, 338 (1842). Post, p. 338.

Further comment on the principal case may be found in Phillips on Insurance, 292, and in Arnold on Marine Insurance (8th Ed.) 679.

The English Marine Insurance Act, 1906, § 20 (5) provides as follows: "A representation as to a matter of expectation or belief is true if it be made in good faith." This would seem to be a statutory repudiation of the doctrine of Dennistoun v. Lillie. See 17 Halsbury's Laws of England, § 808.

tation, without fraud, will not be enough to prevent the plaintiff's recovering; for the contract between the parties is the policy, which is in writing, and cannot be varied by parol. No defence therefore which turns on showing that the contract was different from that contained in the policy, can be admitted: and this is the effect of any defence turning on the mere fact of misrepresentation, without fraud. If however fraud was practised to induce the defendant, or the first underwriter, to sign the policy, no signatures so obtained can be binding. The question therefore is, whether you think there was any wilful and fraudulent misrepresentation made, for the purpose of getting the policy signed: if you are of that opinion, you will find for the defendant; if not, for the plaintiff.

Verdict for the plaintiff.

BRYANT v. OCEAN INS. CO.

(Supreme Judicial Court of Massachusetts, 1839. 22 Pick. 200.)

This was an action on a policy of insurance dated on the 10th of January, 1837, whereby the defendants caused the plaintiffs to be insured in the sum of $9,000 on the brig Hope, for one year, to all ports and places.

The trial was before Shaw, C. J.

It appeared that the brig, which was a new vessel, sailed, after the policy attached, from Damariscotta for New Orleans, and was totally lost and abandoned at sea in March, 1837.

The defence relied on was, that prior to and at the time of effecting the insurance, Cushing Bryant, who acted as agent of the plaintiffs for this purpose, made a representation, in a letter to the defendants, that he was taking in paving stones for ballast and should fill up with hay, and send the vessel to New Orleans from which place she would go into the usual freighting business: but that instead of ballasting the vessel with paving stones and filling her up with a cargo of hay, the owners had put in a cargo of paving stones without hay, which was a much heavier and more perilous cargo, especially for a new vessel, and increased the risk.

The plaintiffs objected to the admission of the evidence of these facts, on the following grounds:

1. That it was an attempt to control and alter the terms of the policy, by evidence of proposals and negotiations which preceded it, and which were all embraced in the terms of the contract itself; and that there being a stipulation in the policy to cover the vessel to all ports and places with any lawful cargo, it could not be restrained by a previous proposal, to a particular employment.
2. That as a representation, it did not relate to any existing fact

but as to what was intended to be done, and could not be deemed false and fraudulent, unless made with a fraudulent intent to mislead the defendants.

It was admitted by the defendants, that they did not expect to prove, that at the time when the representation was made, the plaintiffs had actually laden a cargo of paving stones on board the brig, or that there was a fraudulent intent on the part of the plaintiffs to deceive them; but they insisted, that they relied upon the representation, and had a right so to do, so that without it they would not have taken the risk, or not at the same premium, and that they were not bound by their contract unless the plaintiffs made such representation good.

Whereupon it was ruled, that the evidence offered was not admissible for any other purpose than to prove a fraudulent intent on the part of the insured to mislead the defendants and to induce them to take the risk, or to take it at a lower premium than they otherwise would have done; that as a representation, not of a fact, but of an intention, it did not avoid the policy, unless made with a fraudulent intent; that as it related solely to the employment of the vessel within the time for which she was insured, it was not of an independent or collateral fact affecting the risk, but was embraced in the terms of the contract, and must be considered as absorbed in the contract afterwards formally executed, or as by mutual consent withdrawn and waived by the execution of the policy.

Whereupon the defendants consented to be defaulted, the default to be subject to the opinion of the whole Court.

If the Court should be of opinion, that the evidence ought to have been admitted for the purpose for which it was offered, the default was to be taken off and a new trial granted; otherwise the default was to stand.

Wilde, J., delivered the opinion of the Court. The sole question in this case is, whether there was any such misrepresentation made to the defendants by one of the plaintiffs, in his application for insurance, as will by law avoid the policy.[9] * * *

It has been argued that a misrepresentation will avoid a policy, whether made with a fraudulent design, or by mistake or negligence, as the insurer is thereby led into an error, and computes the risk upon false grounds. This is undoubtedly true as to all facts represented; and so if facts material to the risk, and which the assured were bound to disclose, are, by mistake or negligence, not disclosed, the omission though not fraudulent would avoid the policy. And on this ground there is no doubt, that if the defendants could have proved that, at the time the representation was made, the plaintiffs had no intention to take in a cargo of

[9] Here a summary statement of the case is omitted.

hay, such a false representation would avoid the policy. Indeed if they had no such intention it would have been a fraudulent misrepresentation. That was a question of fact for the jury to decide, if the defendants had inclined to submit it to their decision. But no representation of a party's expectation or belief, unless fraudulently made, will avoid a policy. Nor is there any distinction between a party's expectation, and intention, as to any matter relating to the voyage.[10] * * *

The defendants' counsel have endeavoured to distinguish the case under consideration from that of Bize v. Fletcher and some of the other cases cited. In those cases, it is said, the events expected were prevented by necessity, or were not within the control of the assured; whereas, in the present case, the plaintiffs might have well carried their declared intention into effect, for aught that appears to the contrary, if they had seen fit so to do. But we do not consider this as a sound distinction. No doubt circumstances may be supposed that might justify a jury in finding that the plaintiffs' declared intention was a mere pretence, and that they in fact had no such intention. But if the intention was real, and they had a right to change their intention, there is no evidence to prove that they did not act with good faith.

If the evidence offered was intended to prove an agreement or promise not embraced in the policy, it was clearly inadmissible.

It is a familiar principle of the law of insurance, that a representation is no part of the policy. It is a collateral statement of facts or circumstances relative to the proposed adventure, which may be an inducement to the contract, but is not inserted in the policy. It is said truly, that if information be stated as mere opinion, expectation or intention, it does not amount to a representation. The information of the plaintiffs' intention as to the nature of the cargo, was contained in a letter to the defendants, in which other facts were stated amounting strictly to a representation. The whole was intended as such, and must have been so understood by the defendants. But this is not material; for if the information of the plaintiffs' expectation and intention is strictly no part of the representation, it is clearly no part of the policy, and cannot avail the defendants in any manner.

It is admitted, that by the principles of the common law this evidence could not be admitted, but in respect to contracts of insurance it is contended, that a more liberal rule of evidence should be applied. We think there is no ground for this distinction. The reason of the rule applies to contracts of insurance, as well as to other contracts. The written contract is the best

[10] A brief statement of Bize v. Fletcher, 1 Doug. 287 (1779), s. c. ante, p. 323, is here omitted.

evidence of the understanding and intention of the parties. A representation or other parol evidence is admissible to explain a latent ambiguity, or to prove a usage which may affect the policy; but the like evidence is admissible in explanation of other written contracts. A case is cited 1 Marshall (3d Ed.) 352, where on insurance from Archangel to the Downs, and thence to Leghorn, with a parol agreement that the policy should not attach till a certain period, it was held, that the plaintiff could not recover in contravention of the parol agreement. In Weston v. Emes, 1 Taunt. 115, the court held that this case could not be law, and expressed their opinion that it could not have been so decided.

But if the parol evidence were admissible, it could not sustain the defence. It would only prove the declaration of an intention of the plaintiffs previous to the policy, and as it was not afterwards inserted in the policy the defendants must be presumed to have taken upon themselves the risk of any change of intention; otherwise they would have required a warranty.

In Whitney v. Haven, 13 Mass. 172, it was proved by the broker, that the plaintiff declared, at the time of effecting the policy, that the vessel was to sail within five days, and that the defendant said that his name should be taken off the policy, or that he would not be bound, if she did not then sail. She did not sail within the five days; and the delay was relied upon as a sufficient defence. But the Court decided, that the defendant could not avail himself of it, not because the delay was justified by the apprehended danger of capture, but because the stipulation was no part of the written contract; and that parol evidence was not sufficient to give it effect. This was evidently considered by the Court as quite clear, and we are all of the same opinion.

We are therefore of opinion, that the evidence offered in defence was not admissible, and that the ruling of the court at the trial was, in all respects, correct.

Motion for a new trial overruled.

SECTION 2.—FIRE INSURANCE

ALSTON v. MECHANICS' MUT. INS. CO. OF CITY OF TROY.

(Court of Errors of New York, 1842. 4 Hill, 329.)

Error to the Supreme Court. The action in the court below was upon a fire-policy on a building and some personal property belonging to the plaintiff, which bore date August 27, 1838. The term of insurance was five years, commencing at the date of the

policy. In the policy, the building was described as a brick dwelling-house and shop; and, after setting forth the size of the building and its height above the basement, the policy added—"which basement is privileged as a cabinet-maker's shop." The personal property covered by the policy consisted of "stock in trade in the cabinet business," household furniture, wearing apparel and family stores. Among other conditions contained in the policy was this: "If the said David Alston [the plaintiff] shall make any misrepresentation or concealment, or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, this policy shall be void and of no effect." After issue joined in the court below the cause was referred.

On the hearing, the plaintiff gave in evidence the policy, the preliminary proofs of loss, etc., and then called one Pratt, who testified as follows, viz.: Witness knows the building described in the policy; it was burned down the last of August, 1838; plaintiff occupied the house, and had for some time occupied it as his own. It was totally destroyed except the brick. Witness made out an estimate of the cost of the house, and it amounted to $1,781, etc. Plaintiff is a cabinet-maker and had tools, stock in trade, etc. His shop was in the basement of the building. The witness further testified, on cross-examination, that he lived near the house and saw the fire. The first he saw of it, it appeared to be in the basement—i. e. in the shop. This was between nine and ten o'clock in the evening. A fire was kept in the shop, sometimes in the fire-place and sometimes in the furnace—a portable furnace for cooking and heating glue.

The defendants then called Lyman Garfield, their secretary, who testified to the following facts: On the 27th of August, 1838, the plaintiff called on the witness for the policy of insurance, the application for it having been sent in some time previously. Witness told the plaintiff the company had concluded not to accept the proposals; adding, that he (the witness) understood the plaintiff was using a fire in the fire-place of the cabinet-maker's shop (the basement story of the building) and that the house had before taken fire from that cause. The plaintiff enquired where the president of the company (Mr. Starbuck) resided. Witness informed him; whereupon the plaintiff left, and in about half an hour returned with the president. Some conversation then ensued, and the plaintiff finally said: "I will abandon the use of the fire-place; I have got a stove and will use that." Witness understood him he had a stove in the basement. Upon this statement, we agreed to give him the policy, and did give it to him.

Mr. Starbuck, the president, was then called by the defendants and gave a more full statement of the conversation at the time alluded to by Garfield. He testified, among other things, that

after the plaintiff was informed of the company's unwillingness to accept the risk, the plaintiff said: "Suppose I should abandon the fire-place in the basement, would you then take it?" Witness thereupon consulted with the secretary, and then spoke to the plaintiff, who said he would abandon the fire-place in the basement altogether; that he would not use it himself nor suffer any other person to use it, but would use a stove which he had. Witness and Mr. Garfield then told the plaintiff if he would do that, they would take the risk, and it was taken accordingly. The building burned up two or three days afterwards. The using of a fire-place in the basement, instead of a stove, was material to the risk.

The above testimony of Garfield and Starbuck was objected to by the counsel for the plaintiff in due season; but the referees were of opinion that it was admissible, and therefore overruled the objection.

It appeared from other evidence given, that the plaintiff used the fire-place in the basement, for the purpose of cooking, the next day after the policy was delivered. His affidavit forming a part of the preliminary proofs of loss contained this clause: "I occupied at the time [of the fire] the basement or lower rooms [of the building] as a cabinet-maker's shop, for the manufacturing of furniture, and believe, according to the best of my knowledge, that the fire originated in the last mentioned basement rooms, where I was at work late at night varnishing furniture, a fire being on the hearth at the time for that purpose," etc.

The referees reported in favor of the defendants, and the plaintiff afterwards moved the court below to set aside the report, but the motion was denied. A report of the case in that court, together with the opinion there delivered on denying the motion, will be found in 1 Hill, 510 et seq. After judgment, the plaintiff sued out a writ of error.

Walworth, Chancellor. The loss in this case was clearly covered by the terms of the policy. Those terms unquestionably embraced a loss by fire arising from the use of the basement of the premises as a cabinet-maker's shop, which included the ordinary use of fire for varnishing and the melting of glue. The policy also, by implication at least, gives the assured the right to occupy and use the basement as it was used at the time when the insurance was made; for it contains an express provision that if the premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, the policy shall be void. And the attempt now is to prove, by parol, that the assured, at the time this contract of insurance was made, agreed that he would thereafter occupy this basement room in such a manner as to render the risk less hazardous than it was at the date of the policy. The question then arises whether this sup-

posed agreement, which, if actually made and if there has been no misunderstanding between the parties as to its nature and extent, was of itself a part of the contract of insurance and should have been inserted in the written policy, as a condition or warranty, can be converted into what the defendant's counsel calls a promissory representation; and thus avoid the policy on the ground that the assured has not performed his part of the agreement, when no such agreement is either expressed or implied in the written policy which was executed by the agents of the insurance company.

Marshall, who I admit is a writer of very considerable authority on the law of insurance, does indeed speak of two different kinds of representation, one of which he calls an affirmative and the other a promissory representation. But I have not been able to find any case in which a court has adopted this distinction. And the only other writer on the law of insurance, who appears to have considered a representation as a contract between the parties, is Ellis. He says "a representation in insurance is in the nature of a collateral contract." Ellis' Law of Fire and Life Ins. 29. I have examined Millar, Weskett, Annesley, Hughes, Evans, Park, Beaumont, Phillips, Emerigon, Blaney, Quenault, Grün & Joliat, Vincens, Lafond, Persil, Merlin, Pardessus, Boulay Paty, and the works of some other English and foreign writers on the subject of marine, fire and life insurances; and so far as they say anything on the subject, I find them to concur in saying that misrepresentation, in reference to insurance contracts, is a false affirmation as to some fact, material to the risk; which affirmation is made by the assured, or his agent, either from a mistake as to the fact represented, or with a design to deceive the insurer.

Annesley says, if there be a misrepresentation, it will avoid the policy, as a fraud; but not as a part of the agreement, as in the case of a warranty. And if the representation is false in any material point, even through mistake, it will avoid the policy; because the underwriter has computed the risk upon circumstances which did not exist. Ann. on Ins. 124. Blaney says, it is necessary that the contracting parties should have equal knowledge, or ignorance, of every material fact or circumstance which may or can affect the insurance. And if on either side there is any misrepresentation, allegatio falsi, or suppressio veri, which would in any degree affect the amount of the premium or the terms of the engagement, the contract will be deemed fraudulent and absolutely void. Blan. on Life Assurance, 59. Evans states the difference between a representation and a warranty to be, that the one induces an error in regard to the subject of the contract, and the other is a stipulation of the contract itself. And he divides representations into but two classes—those which are intentionally false, and misrepresentations through mistake. Evans' Law of

Ins. 58, 64. Hughes speaks of a representation as the assertion of a material fact which the insured knows to be false, or which he makes in an unqualified manner without knowing whether it is true or not. Hughes' Law of Ins. 345. Phillips, an American writer, whose treatise on the law of insurance stands deservedly high, says a representation is a material fact stated before completing the contract; and a misrepresentation is the statement of such a fact which turns out not to be true. 1 Phil. on Ins. 90. And Mr. Justice Park, lately one of the English judges, a recent edition of whose valuable work on marine insurances and insurances on lives, and against fire, has been published by Barrister Hildyard, places misrepresentations under the head of frauds in policies. He divides them into two classes—representations intentionally false, and the misstatement of a material fact by mistake. And he defines a representation to be a state of the case; not a part of the written instrument, but collateral to it and entirely independent of it. He also says, if there be a misrepresentation, it will avoid the policy as a fraud, but not as a part of the agreement. 1 Park on Ins. 8 Lond. Ed. 404, 433. See also Quenault Des Assur. Terrestres, 289, No. 374, 375; Persil Traite Des Assur. Terr. 297, No. 210, 211; Grun & Joliat Des Assur. Terr. 260, No. 208; and 2 Boulay Paty Cours De Droit Commercial Maritime, 87, tit. 10, § 14. Chancellor Kent also, in his brief notice of contracts of insurance, speaks of two kinds of misrepresentations only; those which are intentional and avoid the contract for actual fraud on the part of the assured or his agents; and those which arise from mistake or oversight, which do not affect the policy unless they are untrue in substance and are material to the risk. 3 Kent's Com. 283. It is hardly possible to suppose that if there was such a term known to the law of insurance as a promissory representation, rendering the contract void for the non-performance of a stipulation in the nature of a collateral executory agreement, which the parties did not think proper to make a part of the written contract, it would have been passed over in silence by all the writers I have referred to.

Nor do I find any such thing as a promissory representation mentioned in the decisions of the courts. On the contrary, Lord Mansfield, who may be called the father of the present system of commercial law in England, clearly repudiates the idea of a representation being promissory. * * *

These cases therefore show that a statement as to a future fact or event which is in its very nature contingent, and which the insurer knows the party could not have intended to state as a known fact, but as an intention or expectation merely, if honestly made and not with an intent to deceive, is not a collateral contract or a promissory representation which the assured is bound to see performed to render his policy valid. But if the

underwriter considers the statement material to the risk, and is unwilling to insure at the contemplated premium without binding the assured to the performance of it as a condition precedent to his liability, he should make it a part of the contract stated in the policy.

Where the assured acts in good faith without any intent to deceive, and without concealing or misstating any fact within his knowledge which it is essential to the underwriters to know, to enable them to judge of the propriety of assuming the risk and the amount of premium and other conditions of the policy, common justice requires that the party who pays the premium should be informed, by the terms of the written agreement, what is the real contract between him and the underwriters; and it should not be left to the uncertain recollection of any one to prove a different agreement from that which is contained in the written policy. For it frequently happens that where negotiations are carried on between parties, and they suppose they understand one another as to the terms of the bargain, they find, when they come to reduce their agreement to writing, that they do not understand it alike. It is for this reason that parol proof is not admissible to vary or alter the terms or the legal meaning of a written contract, by showing what either party said while the negotiation was going on. Fraud, misrepresentation and deceit are necessary exceptions to this general rule; but there is no good reason why any thing which is in fact a part of the contract between the parties, should form an exception to the rule in an insurance case.

The case now under consideration, I am inclined to think, shows the importance of adhering rigidly to this rule in insurance cases as well as others. For although I have no reason to suppose the president and secretary of the company have not stated the supposed agreement in relation to the use of the fire-place, exactly as they understood it, I have great doubts whether the plaintiff understood that he was to be precluded by that agreement from using the fire-place to heat his glue-pot and warm his varnish; or that he was to remove his cooking apparatus from the basement room the instant the policy was signed, without giving him a reasonable time to put up his stove for cooking in another part of the house. It must be recollected that the conversation took place in dog-days, when a stove was not wanted to warm his shop; but when his family were using the fire-place in that room for family purposes. He therefore most probably spoke in reference to that use of the fire-place, when he said he would abandon the fire-place and use his stove. And as the president and secretary do not themselves agree in respect to the words he used, it is possible that both have misapprehended what he did in fact mean to say on the subject; or he may have inadvertently used

language which did not properly express what he intended to agree to on the subject. That he understood he was to abandon the use of the fire-place for cooking, is very probable. For it appears the family only cooked there until the next day, when he had probably gotten his stove up in another part of the house, or had made some other provision for the necessary fire for family purposes. And if he thus discontinued cooking in the fire-place in good faith, immediately after he had obtained his insurance, it is hardly probable that he would have used the fire-place for the temporary purpose of varnishing, if he had understood that his agreement with the officers of the insurance company extended so far as to embrace such a use. By the terms of his policy, the basement was privileged as a cabinet-maker's shop, which of course included the necessary use of fire for gluing and varnishing.

In Whitney v. Mayer, 13 Mass. 172, the supreme court of Massachusetts decided that the underwriter could not set up a parol agreement between the parties, which was not inserted in the policy, to defeat the insurance; but that if the underwriter intended to avail himself of it, he should have made it a part of the written contract. A similar decision was made by Lord Tenterden in Flinn v. Tobin, 1 Mood. & Malk. Rep. 369. And in this case, no one who reads the testimony can for a moment doubt that a promise to abandon the fire-place and use a stove, was an agreement, and not a representation of a fact. I think the referees erred, therefore, in receiving parol evidence of such an agreement to defeat the policy; and that their report should have been set aside and a venire de novo awarded.

The judgment of the court below is therefore erroneous, and should be reversed.

[The concurring opinion of Bockee, Senator, is omitted.]

All the members of the Court, nineteen being present, concurring in this result, the judgment was unanimously reversed.

DANIELS v. HUDSON RIVER FIRE INS. CO.

(Supreme Judicial Court of Massachusetts, Norfolk, 1853. 12 Cush. 416, 59 Am. Dec. 192.)

This was an action upon a policy of insurance against fire. At the trial in this court, February term, 1853, held by Thomas, J., the plaintiffs having proved a prima facie case, the defendants, a corporation chartered by the laws of the state of New York, relied upon a violation of the statements in the application, numbered 22 and 24. The twenty-second interrogatory was: "Is there a good forcing-pump in the factory, designed expressly for putting out fire, and at all times in condition for use?" The

answer was: "A small force-pump for filling barrels, and with hose to reach each room." The twenty-fourth question inquired, "Are there casks in each loft constantly supplied with water? If there are, what is their capacity, and how many buckets are kept to each cask for use in case of fire?" Ans. "There is in each room, casks of forty-two gallons each, kept full constantly; also, twenty-four buckets in mill." The policy also declared that it was "made and accepted in reference to the terms and conditions hereto annexed, which are to be used and resorted to, in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for." The second clause of the first article of the conditions of the policy provided, that "if any person insuring any building or goods in this office shall make any misrepresentation or concealment, etc., such insurance shall be void and of no effect." The assured also covenanted in said application, "that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured."

The remaining facts appear sufficiently from the opinion. The verdict was for the plaintiffs.[11]

Shaw, C. J. This is an action of contract, to recover on a policy of insurance, made by the defendant company, for a loss by fire. The insurance was upon the plaintiffs' factory building in Medway, and the machinery and stock. The defendant company have their office and principal place of business at Waterford, N. Y. The policy, for one year, purports to be dated there, and signed by the president and secretary; but the negotiation was had by an agent of the company in Massachusetts, and by the terms of the policy, it was not to be valid unless countersigned by their agent at Worcester, and it was so countersigned and delivered by him. There can be no doubt that this is a contract made in Massachusetts, and to be governed and construed by the laws of this state; for though it was dated in New York and signed by the president and secretary there, yet it took effect, as a contract, from the countersignature and delivery of the policy in Massachusetts. It is to be interpreted according to the laws, and with reference to the usages and the practice of this state, in the same manner with any other Massachusetts policy of insurance against fire.

It came to trial before one of the justices of this court; several exceptions were taken by the defendants to the directions and decisions of the judge. These are now brought before the whole court by bill of exceptions.

1. The defendants, relying upon a violation of the statements in the application, contended that these statements were warran-

[11] The statement of facts is much abbreviated.

ties or conditions, and if they were not strictly and literally true at the time of the application, that the policy was void; and that if they were then true, and the plaintiffs afterwards ceased to comply with them, the policy thereupon became void, whether the same were or were not material to the risk. But the presiding judge instructed the jury, that the statements of the application were not warranties, requiring an exact and literal compliance, but that they were representations; and as such, must have been substantially true and correct as to things done, or existing, at the time the policy was issued, and that so far as they related to the future—to things to be done, and rules and precautions to be observed—they were stipulations, to be fairly and substantially complied with.

The court are of opinion, that looking at the policy and the application, this instruction was correct. There is undoubtedly some difficulty in determining by any simple and certain test what propositions in a contract of insurance constitute warranties, and what representations. One general rule is, that a warranty must be embraced in the policy itself. If by any words of reference, the stipulation in another instrument, such as the proposal or application, can be construed a warranty, it must be such as make it in legal effect a part of the policy. In a recent case, it was said that "the proposal or declaration for insurance, when forming a part of the policy, has been held to amount to a condition or warranty, which must be strictly true or complied with, and upon the truth of which, whether a misstatement be intentional or not, the whole instrument depends." Vose v. Insurance Co., 6 Cush. 47. But no rule is laid down in that case, for determining how or in what mode such statements contained in the application, or in answer to interrogatories, shall be embraced or incorporated into the policy, so as to form part thereof.

The difference is most essential, as indicated in the definition of a warranty in the case last cited, and as stated by the counsel for the defendants in the prayer for instruction. If any statement of fact, however unimportant it may have been regarded by both parties to the contract, is a warranty, and it happens to be untrue, it avoids the policy; if it be construed a representation, and is untrue, it does not avoid the contract if not wilful, or if not material. To illustrate this: the application, in answer to an interrogatory, is this: "Ashes are taken up and removed in iron hods;" whereas it should turn out in evidence, that ashes were taken up and removed in copper hods; perhaps a set recently obtained, and unknown to the owner. If this was a warranty, the policy is gone; but if a representation, it would not, we presume, affect the policy, because not wilful or designed to deceive; but more especially, because it would be utterly immaterial, and would not have influenced the mind of either party in making the contract

or in fixing its terms. Hence it is, we suppose, that the leaning of all courts is, to hold such a stipulation to be a representation, rather than a warranty, in all cases, where there is any room for construction; because such construction will, in general, best carry into effect the real intent and purpose which the parties have in view, in making their contract.

In the present case, the only clause in the policy having any bearing upon this question, is this: "And this policy is made and accepted in reference to the terms and conditions hereto annexed, which are to be used and resorted to, in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for." Here is no reference whatever to the application or the answers accompanying it; the only reference is to the conditions annexed to the policy. In looking at these conditions, second clause of article 1, the provision is, that "if any person insuring any building or goods in this office, shall make any misrepresentation or concealment, or, &c.,—mentioning several other cases, all of which would tend to increase the risk,—such insurance shall be void and of no effect."

The terms "misrepresentation" and "concealment" have a known and definite meaning in the law of insurance; and it is that meaning and sense in which we are to presume the parties intended to use them in their contract of insurance, unless there is something to indicate a different intent. "Misrepresentation" is the statement of something as fact, which is untrue in fact, and which the assured states, knowing it to be not true, with an intent to deceive the underwriter, or which he states positively as true, without knowing it to be true, and which has a tendency to mislead, such fact in either case being material to the risk. "Concealment" is the designed and intentional withholding of any fact material to the risk, which the assured, in honesty and good faith, ought to communicate to the underwriter; mere silence on the part of the assured, especially as to some matter of fact which he does not consider it important for the underwriter to know, is not to be considered as such concealment. "Aliud est celare, aliud tacere." And every such fact, untruly asserted or wrongfully suppressed, must be regarded as material, the knowledge or ignorance of which would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of the premium. If the fact so untruly stated or purposely suppressed is not of this character, it is not a "misrepresentation" or "concealment" within this clause of the conditions annexed to the policy.

But further; the clause in this policy has none of the characteristics of a warranty, because it is not, in its own terms, or by reference to the terms and conditions annexed, an absolute stipulation for the truth of any existing fact, or for the adoption of

any precise course of conduct for the future, making the truth of such fact, or a compliance with such stipulation, a condition precedent to the validity of the contract, or the right of the assured to recover on it. The policy is made in reference to the terms and conditions annexed; but these are referred to, not as conditions precedent, but "to be used and resorted to, in order to explain the rights and obligations of the parties hereto, in cases not herein otherwise specially provided for." They are not to control or alter any express provision in the contract, or become parts of the policy; but they are statements in a collateral document, which both parties agree to, as an authoritative exposition of what they both understand as to the facts, on the assumption and truth of which they contract, and the relations in which they stand to each other.

The court are of opinion, therefore, that the statements in this application were not warranties, and could have no greater effect than that of representations, and that the judge was right in giving such instruction to the jury.

2. Another exception was taken to the direction of the judge in regard to the force-pump, which is, that the judge erroneously ruled that the burden of proof was on the defendants, to prove its materiality to the risk, and also, whether it had been complied with or not. This was correct. Whether the answer was responsive to the question or not, it could have only the character of a representation; and, therefore, if the defendants rely either upon the falsity of the representation, or the failure to comply with an executory stipulation, it is upon them to prove it; and it is a question of fact for the jury, in either aspect.

3. With respect to the representation and stipulation that a water-cask should be kept in each room, the presiding judge instructed the jury, that if the plaintiffs established a rule that such water-casks should be kept full, and employed servants to execute such rule, and if, through their negligence at any time, they were not full, such negligence of servants would not avoid the policy.

We understand it to be a well-settled principle in the law of fire insurance, and, indeed, the strong tendency of modern judicial decisions in cases of marine insurance is in the same direction, that the negligence of subordinates, many of whom must often be employed, without much knowledge of them by employers, is one of the perils insured against. In Chandler v. Insurance Co., 3 Cush. 328, the rule is laid down thus: "The general rule unquestionably is, in case of insurance against fire, that the carelessness and negligence of the agents and servants of the assured constitutes no defence." The question there was, whether gross negligence on the part of the assured himself, gross carelessness, equivalent in legal estimation to a wilful intent to burn the building, would be a good defence. It seems difficult to see how an

incorporated company, who must act by agents and servants, could otherwise comply with their representations. If, indeed, such servants and agents are habitually or frequently careless in performing their duties, it may become negligence on the part of the employers, whose duty it is to have a reasonable vigilance over them, and employ faithful servants.

4. The next exception turns on the representation that a water-cask was kept in each room, and the admission of evidence tending to show in what sense the parties understood the word "room." This is a point which seemed most doubtful, and which has had the particular attention of the court.

The question arises upon the representation made in answer to the twenty-fourth interrogatory. It may be remarked, in passing, that there is some discrepancy between the question and answer. Whether designed or not, does not appear. The question is, "Are there casks in each loft constantly supplied with water?" The answer is, "There is in each room, casks of forty-two gallons each kept constantly full." If the plaintiffs intended to conform their answer to the question proposed, then it is manifest, that in their view the word "loft" in the question, and "room" in the answer, would mean the same thing, and the effect of the answer would be, that a cask was kept in each loft. This would raise another question, whether the term "loft" would include the basement story, or only the chambers over the basement the "rooms aloft"? Or, did it mean each story? These considerations are, perhaps, not material, except that they have some tendency to show that the word "room" was used without any very precise or definite meaning. The evidence offered for the purpose of falsifying this representation was, that there was in the basement story a partition, setting off a part for a particular purpose, in which no water-cask was kept,—that in the next story above there was a small apartment partitioned off, in which there was no water-cask; and in the two stories above, the water-casks stood in the entry ways by the doors of the main rooms, and not in the main rooms.

If the plaintiffs, in answering the interrogatory as put, intended to say that there is a cask of water kept for each loft, or each story, the jury might well find that the representation was true: if they intended to use the word "room" in a narrower sense, so as to mean more than one apartment, in each loft or story, then it becomes necessary to inquire what was the extent of the word "room" as used in this answer. The word is certainly a familiar one in the English language, and as ordinarily used and construed, as all words must be, by the subject-matter and the context, is not likely to be misunderstood, yet it is not without some considerable varieties of meaning. Apply it to a dwelling-house, and suppose one, in offering a house to be sold or let, should

represent that there is a fireplace in every room. Suppose there is a cellar, or an attic, with or without windows, are they rooms? Or suppose a large apartment into which the front door opens, used for the double purpose of an entry, and for a sitting-room in warm weather, and furnished for that purpose; is it a room within the representation that there is a fireplace in it? Or suppose above stairs, one or more small apartments, capable of being used as a closet or clothes-press, or for a bedroom; would the representation be falsified by showing that either of these divisions of the house had no fireplace in it? The language might be somewhat ambiguous, and require aid to ascertain its meaning.

The interpretation of written contracts, indeed, of all written documents, is a question of law for the court; and it is of great importance that the meaning of written evidence should not be altered or varied by parol evidence. But this presupposes that the words are used in their ordinary and normal sense, according to the established rules of the language; but if they are foreign words, or words used in a peculiar, unusual, or technical sense, evidence may be proper to show their meaning, and then it is the province of the court to declare and apply the law, according to the true meaning of the language as thus ascertained. The rule is laid down, in the case of Eaton v. Smith, 20 Pick. 156, thus: "When a new and unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or branch of business, or to any particular class of people, it is proper to receive evidence of usage, to explain and illustrate it, and that evidence is to be considered by the jury; and the province of the court will be, to instruct the jury what will be the legal effect of the contract or instrument, as they shall find the meaning of the word modified or explained by the usage."

This principle seems to be intelligible enough, but the difficulty in applying it as a practical rule is this: The words severally and as first read seem plain, but like other matters of latent ambiguity, it is when they come to be applied to the subject-matter, that the ambiguity becomes apparent. Then it is, that evidence of usage, or other evidence aliunde, becomes competent and admissible, to show the sense in which the words were used in the particular written paper. It must depend, therefore, much upon the circumstances of each case, and the posture of the evidence already admitted in the trial, whether such evidence aliunde ought to be admitted. In the present case, we are of opinion that there was sufficient uncertainty and ambiguity in the representation in question, to warrant the introduction of evidence of usage, and it was a question of fact for the jury to decide, whether, according to the true meaning of the language used, the representation was substantially true, when made, and substantially complied with afterwards.

One other ground was taken by the defendants in this branch of the case, thus: The defendants contended not only that the meaning of the word "room" in the application was a question of law for the court to decide, and also whether there was such a general use of language; but also, that if there were such use of language, it was insufficient, unless it was known and general among insurers, as well as manufacturers. Such a direction, we think, would not have been conformable to the rules of law. The general rule on that subject is, that if any person, or any company, foreign or domestic, shall engage in any branch or department of business, they must be presumed to be acquainted with the rules and usages of such business, to be conversant with the language employed in it, whether strictly technical or not. When, therefore, the defendant company undertook to insure a manufactory in Massachusetts, with the machinery and stock therein, they must be presumed to be acquainted with the structure and arrangement of such building, and the distribution of the apartments within it, with a view to its adaptation to the business to be therein carried on, and with the use of the language employed by the owners, superintendents, and persons employed therein. If, therefore, the language of this representation was understood in a particular manner by manufacturers, according to which understanding the representation was true, the legal presumption is that it was so understood by the insurers, in their contract.

5. Exception was taken to the admission of the witness Adams as an expert; but no sufficient ground has been shown that his admission was erroneous; nor does it appear to us that the questions permitted to be put to him, and the answers he gave to them, for the limited purpose to which they were confined by the instructions given thereon to the jury, are open to exception. Exceptions overruled.

CONTINENTAL INS. CO. v. KASEY.

(Supreme Court of Appeals of Virginia, 1874. 25 Grat. 268, 18 Am. Rep. 681.)

STAPLES, J., delivered the opinion of the court.

This is an action of assumpsit upon a policy of insurance executed by "the Continental Insurance Company," of the city of New York. The action was brought in the circuit court of Roanoke county, where, as is averred, the insurance was effected and the property was located. A verdict and judgment were rendered in favor of the plaintiff. Upon the trial various exceptions were taken by the defendants to the rulings of the court. It is, however, only necessary at present to notice the defendant's fourth bill of exceptions, which brings before us the instructions offered during the trial.

Both parties asked for instructions. Some of those asked for by

defendants were given, others were refused. In relation to those that were refused it is impossible for this court to say that any error was committed in so doing, for the plain reason that the bill of exceptions contains no part of the evidence. A party complaining of the action of the court in refusing his instructions, is required always to incorporate in his bill of exceptions so much of the evidence at least as tends to show that the instructions have some application to the subject matter of controversy. Unless this is done the court may be continually required to consider mere abstract questions of law having no bearing upon the case. This is the well settled doctrine of the appellate courts everywhere.

This brings us to the consideration of the three instructions given at the instance of the plaintiff. The first and third are substantially the same, and may be examined together. They declare, in effect, that the plaintiff has a right of recovery upon the policy although misrepresentations may have been made by him to the defendant before and in regard to the property insured, unless such misrepresentations were material or prejudicial, and were wilfully made with intent to defraud the defendants. The proposition here announced is an entire misconception of the law governing contracts of insurance. The error is in assuming that a misrepresentation, to defeat the policy, must be made with intent to defraud.

The rule upon this subject is thus laid down in Flanders on Insurance, page 327. Any material misrepresentation therefore, or any failure to comply with the conditions of the insurance on the part of the assured, will avoid the policy, such as misrepresentation of the construction, nature, character, value and situation of the premises or goods to be insured, or any other misrepresentation that induces the insurer to take the risk which he otherwise might have rejected, or to take it at a less premium.[12] * * *

As has been seen, the instructions of the circuit court ignore these principles. They assert that no misrepresentation, however material, affects the policy, unless made with a fraudulent intent. This was clearly erroneous, and renders it necessary that the verdict and judgment should be set aside and a new trial awarded.

The second instruction presents a question of greater difficulty. It declares that although the plaintiff may have represented the premises to be frame and shingle houses, yet if the agent of the company was present and inspected the buildings at the time of the agreement to insure, and before the policy was issued, and inserted the description in the policy, based upon his own inspection as well as the plaintiff's representations, and such a description was a mistaken one, the plaintiff is entitled to recover, notwithstanding the misdescription contained in the policy.

[12] Here reference was made to Carpenter v. American Ins. Co., 1 Story, 57, Fed. Cas. No. 2,428 (1839), and Columbian Ins. Co. v. Lawrence, 2 Pet. (U. S.) 25, 7 L. Ed. 335 (1829).

The chief difficulty in the way of maintaining this instruction is that by the express terms of the policy, the description of the property therein contained is made an express warranty. And the doctrine is well understood, that a warranty is in the nature of a condition precedent. It is a matter of no sort of importance whether in such case the condition be material or immaterial, it must be literally performed. This is the general rule. Circumstances, however, sometimes occur to prevent its application. For example, if the company, not relying upon the statements of the insured, sends its own agent to examine the property, and thereupon issues the policy upon the faith of his representations, it would seem to be clear that the insured would not be responsible for a misdescription of the property, however material, though inserted in the policy and constituting a warranty, unless, indeed, there was a withholding of information by the insured incompatible with the obligations of good faith and fair dealing.

But suppose, as assumed in the instruction, the agent makes an examination of the property in behalf of the company, and inserts in the policy a misdescription, based as well upon that examination as upon the representations of the insured, what is the effect of a misdescription thus attributable to the mistake of both parties? This will depend very much upon the circumstances. If the representation of the owner was not bona fide, or if its effect is to induce the company to issue a policy which it otherwise would have rejected, it may be that the insured ought to bear the loss, notwithstanding the company, through its agent, may have contributed to the mistake.

On the other hand, if the mistake was an innocent one, and the representation was in no wise material to the risk, justice and sound policy would seem to require that the company shall be held to the observance of its contract. The rule of law which invalidates an insurance unless the warranty is strictly performed however immaterial it may be, is an extremely technical one. Its operation is often to defeat the right of recovery contrary to the plain justice of the case and the real intent of the parties. A rule thus stringent ought not to be applied to an innocent mistake, not affecting the risk, to which both parties have contributed. The company cannot justly complain that it is liable in such case; first, because its own agent has aided in the misrepresentation; and secondly, because its conduct would not have been different had the fact been truly stated.[13] * * *

The case before us presents a striking illustration of the views here suggested. The record does not contain all the evidence adduced on the trial. It is very evident, however, that the east end of the main building insured was made of logs, weatherboarded and plas-

[13] Here the court quotes extensively from Union Mut. Life Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 222, 20 L. Ed. 617 (1871), post, p. 506.

tered. No one could see these logs, and it is very probable their existence was unknown both to the plaintiff and the agent of the company. Both concurred in representing the buildings as frame, and this description was inserted in the policy. Now, conceding that this was a misdescription, which is very questionable, to say the least, no one can suppose it was material to the policy, or that it had the slightest effect upon the premium. In other words, the misrepresentation, if such it was, was wholly immaterial. And we are told that this constitutes a breach of warranty, and a consequent forfeiture of the policy. We cannot subscribe to this view. If any breach has occurred, we think the company is estopped, under all the circumstances, to insist upon it. This of course is said upon the assumption that the facts are as stated in the instruction. We are therefore of opinion that the second instruction correctly expounded the law, except that it does not sufficiently distinguish between material and immaterial representations. As already stated, if the description of the property contained in the policy was material to the risk, the plaintiff cannot recover, notwithstanding the agent of the company may have concurred in the misrepresentation. Upon any future trial the instructions may be so modified as to conform to this view.[14] * * *

Judgment reversed.

ARMOUR v. TRANSATLANTIC FIRE INS. CO. OF HAMBURG, GERMANY.

(Court of Appeals of New York, 1882. 90 N. Y. 450.)

Appeal from judgment of the General Term of the Superior Court of the City of New York, entered upon an order made on the first Monday of March, 1881, which affirmed a judgment in favor of defendant, entered upon an order dismissing plaintiffs' complaint on trial. Reported below, 15 Jones & S. 352.

This action was upon a policy of fire insurance, the material portions of which, as well as the facts pertinent to the questions discussed, are stated in the opinion.

RAPALLO, J. The court at the trial dismissed the complaint in this action on the defendant's evidence, and refused the plaintiffs' request to submit the questions of fact in the case to the jury. The only questions for our consideration are whether the facts alleged on the part of the defendant were, or either of them was, sufficient to defeat the plaintiffs' claim to recover, and so clearly proved by conclusive or uncontroverted evidence as to justify the court in withdrawing the case from the consideration of the jury. The action was upon a policy of insurance issued by the defendant upon a warehouse of the plaintiffs in the city of Chicago, which was partially destroyed

[14] The remainder of the opinion, concerning principally matters of pleading, is omitted.

by fire upon the 25th of January, 1879. The warehouse consisted of three sections, and the amount of insurance on one of the sections covered by the plaintiffs' policy was $3,000. The loss on that section was about $14,000, and the total insurance thereon about $17,000. The amount insured on all three sections was $38,000, exclusive of defendant's policy at the time of the loss. The pro rata share of loss claimed from the defendant was $2,440.

The defendant set up three defenses: First. That the policy was issued upon a misrepresentation of the plaintiffs, through their agent, that the rate of insurance in Chicago on the premises insured was, at the date of their application for said insurance, seventy-five cents for every $100 insured for the term of one year; whereas in fact the rate of insurance upon the property in Chicago at the time of plaintiff's application was $1.25 for every $100 insured. Second. That, at the time of the application for said insurance, the plaintiffs, by their agent, represented that the property sought to be insured was already insured in the amount of $200,000 in various other companies, of which a list was furnished; that the defendant relied upon the truth of said representation in making the policy and accepting the risk, but that in fact none of the property mentioned in said policy was insured in the amount of $200,000, or to exceed the sum of $50,000. Third. That, according to the terms of the policy, the defendant was entitled to terminate it on giving notice to the plaintiffs, and that it did so elect to terminate it before the alleged loss by fire.

The plaintiffs, after making the prima facie proof necessary to maintain the action on their part, rested their case, and the defendant introduced evidence in support of the defenses set up by it. We have carefully examined the evidence, and think there may be some question as to whether the allegation of misrepresentation as to the rate of insurance should not have been submitted to the jury; but the defense of misrepresentation as to the amount of insurance on the property was, we think, so fully established that a verdict in favor of the plaintiffs could not have been sustained.

The insurance was effected by the plaintiffs through Mr. Cameron of Chicago, who, with the knowledge of the plaintiffs, employed a broker in New York named Dickinson, to obtain the insurance in that city. The whole warehouse was divided into three separate sections—A, B and C. Mr. Cameron was authorized by the plaintiffs to procure $80,000 upon the entire building, viz., $20,000 on section A, and $30,000 each on sections B and C. The plaintiffs at that time had over $200,000 of insurance upon the stock of merchandise in the warehouse, but had no insurance upon the building. Mr. Cameron by letter instructed Mr. Dickinson in New York as to the situation of the building, and informed him that he probably should request him by telegraph to effect the insurance in question, in New York, on the building; that $200,000 had already been placed on the three sections at three-quarters per cent. Mr. Cameron, in his testimony

taken on commission, says that in employing that language he referred to the insurance on the stock in the warehouse, and did not intend to refer to the insurance on the building. But nevertheless the letter which conveyed Mr. Cameron's instructions states distinctly that $200,000 had already been placed in Chicago, on the three sections of the warehouse, and Mr. Dickinson states that he understood that the $200,000 of insurance was upon the warehouse.

Mr. Hoenig, the general manager of the defendant, testified that when Dickinson applied to the defendant for the policy in question, he stated to him that he already had $200,000 of insurance on the building in Chicago, and that in issuing the policy he acted upon the statement of Mr. Dickinson that the board rate of insurance in Chicago was seventy-five cents on $100, and that there had already been procured insurance on the building to the amount of $200,000. Mr. Dickinson does not contradict this statement, but testifies that he exhibited to Mr. Hoenig the list of companies which he had received from Chicago, stating that they were on the risk, and that he understood that that risk was on the building, and he was not informed that it was on the stock until after the fire. There is consequently no conflict of evidence on that point between these two witnesses.

By the terms of the policy of the defendant other insurance was permitted without notice, and it was provided that losses should be apportioned on the whole sum insured, and it was further provided that any omission to make known every fact material to the risk, or any overvaluation, or any misrepresentation whatever, either in a written application or otherwise, should avoid the policy. The representation in this case was not fraudulent, and arose from a mistake or misapprehension of the plaintiffs' agent, but, nevertheless, it was a very material representation, and was untrue, the insurance on the entire building being, as appears by the testimony of one of the plaintiffs, only $30,000 at the time of the application to the defendant, and the insurance on the section which was injured only $17,000. Had the insurance been $200,000, the proportion of loss chargeable to the defendant would have been comparatively trifling. The risk was greatly enhanced by the comparatively small amount of insurance actually existing.

On the other branches of the defense, the testimony indicates that the defendant issued the policy to Mr. Dickinson with the express understanding that if the board rate in Chicago was more than three-quarters per cent., the policy should not take effect and should be returned, and that long before the fire, having ascertained that the rate was $1.25, they recalled the policy and demanded its surrender. There is however some slight conflict of evidence in relation to these points, but it is unnecessary to consider them, as we find that the misrepresentation as to the amount of other insurance is so clearly established that a recovery by the plaintiffs could not have been sustained. It is

not necessary, in all cases, in order to sustain a defense of misrepresentation in applying for the policy, to show that the misrepresentation was intentionally fraudulent. A misrepresentation is defined by Phillips to be where a party to the contract of insurance, either purposely or through negligence, mistake, or inadvertence, or oversight, misrepresents a fact which he is bound to represent truly (Phil. Ins. § 537), and he lays down the doctrine that it is an implied condition of the contract of insurance that it is free from misrepresentation or concealment, whether fraudulent or through mistake. If the misrepresentation induces the insurer to enter into a contract which he would otherwise have declined, or to take a less premium than he would have demanded had he known the representation to be untrue, the effect as to him is the same if it was made through mistake or inadvertence, as if it had been made with a fraudulent intent, and it avoids the contract. An immaterial misrepresentation, unless in reply to a specific inquiry, or made with a fraudulent intent, and influencing the other party, will not impair the contract. But if the risk is greater than it would have been if the representation had been true, the preponderance of authority is to the effect that it avoids the policy, even though the misrepresentation was honestly made. Phil. Ins. §§ 537–542; Wall v. Insurance Co., 14 Barb. 383.

A material misrepresentation by the agent for effecting the insurance will defeat it, though not known to the assured, and though made without any fraudulent intent on the part of the agent, to the same extent as though made by the assured himself. Carpenter v. Insurance Co., 1 Story, 57, Fed. Cas. No. 2,428. In this case (which was a case of fire insurance), Story, J., says: "A false representation of a material fact is, according to well-settled principles, sufficient to avoid a policy of insurance underwritten on the faith thereof, whether the false representation be by mistake or design." [15]

[15] "There is nothing to show that the misstatement with respect to the incumbrance was fraudulently made, and we assume that it was the result of an honest mistake on the part of Mr. Seal. The question, then, is whether, under the conceded facts, the misrepresentation rendered the contract void. It has been held that, when the application is oral, and no inquiry is made as to the character or condition of the title, mere silence will not avoid the policy. Insurance Co. of North America v. Bachler, 44 Neb. 549, 62 N. W. 911 (1895); Hanover Fire Ins. Co. v. Bohn, 48 Neb. 743, 67 N. W. 774 (1896); Slobodisky v. Phenix Ins. Co. of Hartford, 53 Neb. 816, 74 N. W. 270 (1898). But we know of no case holding that the misstatement of a material fact inducing the acceptance of the risk will not vitiate the contract. When the insurer makes inquiry about facts material to the risk, he is justified in acting on the assumption that the information imparted by the applicant for insurance is correct. He is entitled to know whether the property to be insured is incumbered, and, if so, to what extent, so that he may act intelligently in determining whether he will accept or decline the risk. The representations of the applicant become the basis of insurance, and, if they be false touching matters material to the risk, the contract obtained through their influence cannot be enforced; and it is in such case quite immaterial whether the misstatement resulted from bad faith or from accident or ignorance. Davenport v. New England Mut. Fire Ins. Co., 6 Cush. (Mass.) 340 (1850); Hayward v. New England Mut. Fire Ins. Co., 10 Cush. (Mass.)

The rules as to misrepresentations and concealments, or omissions to state facts material to the risk, are more strict in cases of marine than of fire insurance. But the distinctions are founded on the differences in the character of the property, and the greater facility the insurers possess, of obtaining information as to its condition and surrounding circumstances in cases of insurance on buildings, etc., than on vessels, which are often insured when absent or afloat, and the distinctions are applied, ordinarily, in cases where the insurer sets up the omission of the insured to state material facts. In those cases there is a difference between the rules applicable to marine insurances and those applicable to fire insurance. But where the defense is a material affirmative misrepresentation as to a matter which is presumably within the knowledge of the party applying for the insurance, and as to which the insurer has not the same means of knowledge, there is no ground for any distinction between cases of fire and marine insurance. See Phil. Ins. § 635 et seq.

Where any doubt exists as to the materiality of the misrepresentation, it is a question of fact for the jury. But in this case it so clearly appears that the amount of risk incurred by the defendant was so much greater than it would have been had the representation as to other insurance been true, that a verdict that the representation was immaterial could not have been sustained. Aside from these considerations however in the present case the parties stipulated in a policy that any misrepresentation whatever, either in a written application or otherwise, should avoid the policy, and the parties, by this agreement, put every material representation on the same footing as a warranty. Burritt v. Insurance Co., 5 Hill, 188, 40 Am. Dec. 345. That that is the effect of such an agreement was reaffirmed in this court in Gates v. Insurance Co., 2 N. Y. 49–53.

The judgment should be affirmed. All concur. Judgment affirmed.

444 (1852); Brown v. People's Mut. Ins. Co., 11 Cush. (Mass.) 280 (1853); Jacobs v. Eagle Mut. Fire Ins. Co., 7 Allen (Mass.) 132 (1863); Anderson v. Fitzgerald, 4 H. L. Cas. 484 (1853); Byers v. Farmers' Ins. Co., 35 Ohio St. 606, 35 Am. Rep. 623 (1880); Ryan v. Springfield Fire & Marine Ins. Co., 46 Wis. 671, 1 N. W. 426 (1883); Glade v. Germania Fire Ins. Co., 56 Iowa, 400, 9 N. W. 320 (1881)." Seal v. Farmers' & Merchants' Ins. Co., 59 Neb. 253, 80 N. W. 807 (1899). See, in accord, Madsen v. Farmers' & Merchants' Ins. Co., 87 Neb. 107, 126 N. W. 1086, 29 L. R. A. (N. S.) 97, Ann. Cas. 1912A, 985 (1910).

SECTION 3.—LIFE INSURANCE

WHITTINGHAM v. THORNBURGH et al.

(Court of Chancery, 1690. 2 Vern. 206, Pre. Ch. 20, 2 Eq. Cas. Abo. 635.)

The defendant Thornburgh in March, 1689, caused a policy of insurance to be drawn for the ensuring the life of one Edward Harwell for a year, and left it at one Samuel Luplon's office, to get subscriptions at five pounds per cent. premium; and to draw in the plaintiffs and others to under-write the policy, procured one Marwood, a near neighbour of Harwell's to under-write one hundred pounds: and he giving out he knew Harwell healthy and like to live, and the plaintiffs relying on such information, under-wrote the policy. Whittingham for a hundred pounds, the other four for fifty pounds apiece. Harwell soon after died.

It appearing that Thornburgh had no estate or interest that depended on Harwell's life; that Marwood's subscription was only colourable to draw in others, and that Harwell was in a languishing condition; though Marwood affirmed and pretended he was his neighbour and a healthful man, and the plaintiff having on the first discovery of the contrivance offered to return the premium, and published the fraud to prevent others from being drawn in; and the defendants intending to get a very large subscription, having by a like contrivance, got between one and two thousand pounds, on making the like insurance on the life of William Sweeting, THE COURT therefore decreed the policy of insurance to be delivered up to be cancelled, and a perpetual injunction against the verdict thereon obtained at law, and the plaintiffs their full costs both at law and in this court, and the money received for the premium to go in part of their costs.[16]

[16] The decree so as to the payment of costs, etc., but nothing said as to the money received for the premium to go in part of costs. Reg. Lib. 1680, B. fol. 264.—REP.

But Park states that the premium was ordered to be repaid by the insurer; Park, Ins. (5th Ed.) p. 216. Park further says: "In two or three instances in the Court of Chancery where the underwriters have been relieved from the payment of the sums insured, on account of fraud, the decree has directed the premium to be returned." In supporting the statement, in addition to the principal case, he cites De Costa v. Scandret, 2 P. Wms. 170 (1723), ante, p. 244, and Wilson v. Ducket, 3 Burr. 1361 (1762), both cases of marine insurance.

STACKPOLE v. SIMON.

(Nisi Prius, 1779. Park, Ins. [3d Ed.] 437.)

Action on a policy of insurance for £150. at four guineas per cent. in case Drury Sheppey should die at any time between the 1st of April, 1777, and the 1st of April, 1778, both days included, and during the lifetime of John Sheppey, the father of Drury; but in case the said John should die before the said Drury, the policy to be void. The question was, as to the representation of the life at the time of the insurance. The interest in the insurance was £900. due from Drury Sheppey to the plaintiff. It was admitted, that the life expired within the time limited in the policy. Drury Sheppey had a place in the Custom-house of Ireland, and was in bad circumstances. He went to the south of France for the benefit of his health, or to avoid his creditors, and there died. The broker, who effected the policy, told the underwriters that the gentleman, for whom he acted, would not warrant, but from the account he (the broker) had received, he believed it to be a good life.

Lord MANSFIELD. As to the interest, this policy may be considered as a collateral security for the debt due to the plaintiff. Where there is no warranty, the underwriter runs the risk of its being a good life or not. If there be a concealment of the knowledge of the state of the life, it is a fraud. It is a rule that every subsequent underwriter gives credit to the representation made to the first; and it is allowed that any subsequent underwriter may give in evidence a misrepresentation to the first. The broker here does not pretend to any knowledge of his own, but speaks from information. There is no fraud in him.

There was a verdict for the plaintiff.

WATSON v. MAINWARING.

(Court of Common Pleas, 1813. 4 Taunt. 763.)

This was an action brought by the executors of Dr. Watson, deceased, against the Equitable Insurance Office, to recover a sum which had been insured on his life. Upon the trial of the cause at the sittings after Hilary term, 1813, before Gibbs, J., the office resisted the demand on the ground that when the policy was effected the deceased had, (in breach of his declaration to the contrary,) a disorder tending to shorten life, and that the policy was therefore void. For the plaintiff it was proved by an eminent physician of Bath, to whom Dr. Watson had applied for advice, that his disorder was an affection of the bowels; that this disease may

proceed from either of two causes, the one a defect of some of the internal organs, the other a mere dyspepsia; that the first would tend to shorten life; that the second, though it renders the patient uncomfortable, does not generally, unless it increases to an excessive degree, tend to shorten life, and that the complaint with which Dr. Watson was afflicted was not the organic dyspepsia. Several other medical men stated that they had attended Dr. Watson since the policy had been effected, and that he was then quite free from the disorder. On the other hand, several medical persons stated, as witnesses for the defendants, that they had seen him at the time of his visiting Bath previously to effecting the insurance, and that they then considered him as a failing man. It was left to the jury whether the patient's complaint was the organic dyspepsia, and if it was not, whether the dyspepsia under which he laboured was at the time of effecting the policy of such a degree, that by its excess it tended to shorten life. The jury found that it was neither organic nor excessive, and gave a verdict for the plaintiff.

Shepherd, Serjt., on this day moved to set aside the verdict and have a new trial, contending that since the assured afterwards dies of the same disorder which he had before effecting the policy, that circumstance was conclusive proof that he was then afflicted with a disorder tending to shorten life.

Chambre, J. All disorders have more or less a tendency to shorten life, even the most trifling; as for instance, corns may end in a mortification; that is not the meaning of the clause. If dyspepsia were a disorder that tended to shorten life within this exception, the lives of half the members of the profession of the law would be uninsurable.

Gibbs, J. According to the rule contended for, the assured, to be insurable, must have no disease at all. It cannot be said that this was not a case, if ever there was one, fit to be left to a jury; and though the office had very good grounds to try the cause, since it has been fairly submitted to a jury, there is as little ground for the Court to interfere, as in any case that ever was tried.

Rule refused.

MAYNARD v. RHODE.

(Nisi Prius, 1824. 1 Car. & P. 360; s. c. 5 Dowl. & R. 266.)

Action on two policies of insurance effected by the plaintiff at the Pelican Insurance Company, (to which the defendant was secretary,) on the life of Colonel Lyon, to whom the plaintiff was an annuity creditor. One of the policies was dated on the 16th of May, 1823, and was for £690., the other was dated on the 17th of June, and was for £650.

Colonel Lyon died in October, 1823, of a bilious remittent fever. The execution of the policies was admitted, and also the plaintiff's interest.

The defence was, misrepresentation and improper concealment on the part of Colonel Lyon, previous to the effecting of the policies.

To substantiate this defence, it was proved that the office, previous to the execution of the policies, sent a number of printed questions to Colonel Lyon, for him to answer: among which were the two following: "Who is your medical attendant?" To which Colonel Lyon answered, "I have none except Mr. Guy, of Chichester;" and "Have you ever had a serious illness?" To this he answered, "Never!" Mr. Guy was referred to, and he gave it as his opinion that Colonel Lyon was an insurable life. But it was proved that Mr. Guy had not been called on to attend him for three years previous to his giving his certificate; but that, in the year 1823, Colonel Lyon was attended, from the month of February to the month of April, by Dr. Veitch, a physician, and Mr. Jordan, a surgeon, for an inflammation of the liver, and a fever, and determination of blood to the head. The former of these gentlemen proved that he considered him to be in a dangerous way, and that he prescribed active medicines, and ordered him sometimes sixteen leeches a day; and that he would not have certified him to be in health till the end of the month of May. It was, however, agreed on all hands, that the disease of which he died, had no relation to any of the complaints for which these gentlemen attended him.

Abbott, C. J. The question is, whether any wilful misrepresentation or suppression of the truth took place on the part of Colonel Lyon, to induce the office to effect these policies; and the jury must consider whether the reference to Mr. Guy, when he was daily attended by a physician and surgeon in town, was intended to prevent a disclosure of his real state of health? For, if he referred to Mr. Guy, because he would speak well of his health, and thought that, if he referred to the other medical men, they would not so certify, though he did not die of the disease he was then afflicted with, I am clearly of opinion, that the defendant is entitled to a verdict. And if the reference was made to Mr. Guy, because he did not know the Colonel's latter state of health, this is such a misrepresentation as will avoid the policies. And though the party here was an annuity-creditor of Colonel Lyon, yet, if he allowed the Colonel to make these representations when the policy was effected, he is bound by them;[17]

[17] In his argument in the case of Everett v. Desborough, 5 Bing. 501, 512 (1829), Serjeant Wilde makes the following statement with reference to the principal case: "In Maynard v. Rhode the declaration in the cause alleged that Colonel Lyon, the life insured, had himself subscribed and delivered into the Pelican office a declaration setting forth his ordinary and then state of health, and that such declaration did set it forth truly, and was part of the consideration for the defendant's entering into the contract."

and, however hard it may be on the plaintiff, the rules of law must be adhered to.

Verdict for the defendant.

Before Abbott, C. J., and Bayley, Holroyd, and Littledale, JJ. In Banc.

Scarlett moved for a rule nisi, for a new trial, and contended that, however a misrepresentation or a concealment of the state of facts by the insured might invalidate the policy, yet here the insurer and insured knew equally little of the fraud; and he therefore submitted, that a fraud committed by a third person would not affect the policy; more especially, as the Insurance Office made their own inquiries into the facts.

Bayley, J. Are there not the usual representations in the policy?

Scarlett. There are, my Lord; but though I admit that if Colonel Lyon had procured the insurance, the policy would have been clearly void; yet the present plaintiff Maynard was entirely innocent of the fraud, and therefore ought not to be prejudiced; yet the Lord Chief Justice laid down, that, if the representations were falsely made by Colonel Lyon, without the privity of the plaintiff, they avoided the policy.

Bayley, J. The representation is made part of the policy, and, therefore, the bargain is only conditional; and it is equally a condition in the policy, let it be made by whomever it may.

Holroyd and Littledale, JJ., concurred.

Rule refused.[18]

[18] Lord Campbell, in Wheelton v. Hardisty, 8 El. & Bl. 232, 269 (1857), distinguishes the principal case as follows: "So in Maynard v. Rhode, 5 Dowl. & R. 266 (1824), the policy is not set out; the 'life' was considered the agent to effect the policy, which cannot be pretended here; it was regarded as a conditional policy; and therefore the untrue representation by the 'life' of a fact of which the assured was not cognizant was taken to have been incorporated in the policy." In Wheelton v. Hardisty, supra, it was held that the concealment of a material fact made by the life insured, without the knowledge of the person taking out the policy, did not avoid the contract. See, also, Everett v. Desborough, supra; Huckman v. Fernie, 3 M. & W. 505 (1838); Rawlins v. Desborough, 2 Moo. & R. 329 (1840); MacDonald v. Law Union Ins. Co., L. R. 9 Q. B. 332 (1874); Joel v. Law Union Ins Co., [1908] 2 K. B. 275.

WAINWRIGHT[19] v. BLAND.

(Court of Exchequer, 1836. 1 Mees. & W. 32.)

Assumpsit against the defendants, three of the directors of the Imperial Life Insurance Company, on a policy of insurance for £3000., dated 22d October, 1830, for insuring the life of the deceased, Miss Helen Frances Phœbe Abercromby, for the period of two years from that date. The declaration averred the death of Miss Abercromby on the 21st of December, 1830, and the plaintiff's appointment as her sole executor, by her will dated the 13th of the same month. Plea, the general issue.

At the trial before Lord Abinger, C. B., at the Middlesex Sittings after Michaelmas Term, it clearly appeared that the policy was effected by the deceased, by the persuasion and for the benefit of Mr. Wainwright, the plaintiff, and his wife, who was the deceased's half-sister; that the premiums were paid by the plaintiff; that on the deceased's first attendance at the company's office, on the 14th of October, 1830, in company with Mrs. Wainwright, she represented that the insurance was intended to secure a sum of money to her sister, which she should be able to do if she outlived the term of two years; and that, on being asked by the actuary whether she had effected insurances with any other office, she answered, "I wish to insure £5000., but as your office only takes £3000., I shall propose £2000. to some other office." The defendants having subsequently ascertained that she had effected a policy for £5000. with another office, and had made a proposal to a third which had been declined, on her attending again at the Imperial Office, on the 22d October, the actuary informed her that the directors were much displeased at her not answering his former question in a straightforward way. She said, "I know very little of the business myself; I do as my friends direct me." It was proved that she had, previously to this time, effected insurances with various offices, all of them for a period of two years only, to the amount, in the whole, of £11,000. Miss Abercromby died suddenly on the 21st December, 1830, having, by her will, dated the 13th, bequeathed the benefit of her policies to her sister, and appointed the plaintiff her sole executor. It appeared that she had executed two wills, both of

[19] The plaintiff in this case was Thomas Griffiths Wainwright, distinguished as an artist and essayist and as an incorrigible criminal. He appears to have been an intimate associate of Hood, Cunningham, Hazlitt, De Quincey, and Charles Lamb. He began his career of crime at the age of thirty as a forger. Two years later he appears to have poisoned his uncle, whose property he inherited. There is little doubt but that he poisoned Helen Abercromby, the life insured in this case, with the deliberate purpose of obtaining the insurance money.

For other cases in which insurance policies have been taken out for the manifest purpose of maturing them by murder, see Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997 (1886); Valton v. National Fund Life Assur. Co., 20 N. Y. 32 (1859); Id., *40 N. Y. 21 (1864).

which were in the possession of the plaintiff, who was proved to have stated, (showing them to the witness,) a short time after Miss Abercromby's death, that they were made "in order that if the one failed, the other might do for him." The plaintiff, as her executor, swore her personal property not to exceed £100.; and it was proved that she was in fact in indigent circumstances, and without the means of paying the premiums. In the printed list of questions required by the articles of the Imperial Office to be answered by the assured, no question was stated as to insurances effected by the party with other offices. The Lord Chief Baron left it to the jury to say, first, whether the insurance was effected by the deceased bona fide for her own benefit, or as the agent of Wainwright; secondly, whether the false representations made by Miss Abercromby to the defendants related to a matter material to be known by them as insurers. The jury found that she effected the insurance as the plaintiff's agent, and for his benefit, and that the false representations were on material points; and a verdict was thereupon entered for the defendants.

Erle now moved for a rule nisi for a new trial. Assuming that the policy was effected for the benefit of the plaintiff, still, as Miss Abercromby was of full age, and could be no party to a scheme of securing the payment of the money within the two years, the plaintiff's intention to obtain the benefit of the policy could not operate to relieve the defendants from their contract with the deceased, in whose right the plaintiff now sues as her executor. Even his expectation of her speedy death, supposing it to have existed, was no answer to an action on the policy by the party lawfully entitled to the benefit of it. The question, whether she knew that the plaintiff intended all this, was not left to the jury. [PARKE, B. She might not know the whole: but she must have known she had not funds to pay the premiums, and that she intended Wainwright to have the benefit of the insurances, if they became payable.] But where she herself, by her representative claims the benefit of the policy, the defendants cannot set up that there was an intention that a third party should have the benefit of it. [PARKE, B. Your argument is, that any person may lawfully insure his life for the benefit of another, whatever be the intention of that other party, and from whomsoever the funds are to come.] That is the argument; if she has the legal interest, that satisfies the statute. [Lord ABINGER, C. B. Independently of this point, the jury found that she made a false representation that it was for her sister, and also as to her applications to other offices.] It is questionable whether the defendants are at liberty to rely on representations made in answer to parol inquiries, when their articles contain stipulations only as to written inquiries and the answers to them. The policy is framed so as to be void only on a false representation in writing. [GURNEY, B. There may be many questions material to be asked,

preparatory to the written contract.] The questions did not bear on the probability of the life enduring for two years.

Lord ABINGER, C. B. There may perhaps be some doubt on the first point; but it is clear the policy was avoided by the false representations. There can therefore be no rule.

PARKE, B. From the nature of the contract, a suppression of any material fact, or a false answer to any material question, must avoid the policy; Lindenau v. Desborough, 3 C. & P. 350, 8 B. & C. 586, 3 Man. & Ry. 45, S. C. On the other point there may be some doubt, but it is unnecessary to give any opinion upon it.

GURNEY, B., concurred.

Rule refused.

FITCH v. AMERICAN POPULAR LIFE INS. CO.

(Court of Appeals of New York, 1875. 59 N. Y. 557, 17 Am. Rep. 372.) [20]

RAPALLO, J. The exceptions mainly relied upon on the argument are those taken to the refusal of the judge to grant the motion for a nonsuit; to his refusal to charge the jury that "if they believed that Fitch had had any disease of the eyes such as to require care and attention, no recovery could be had;" that "if they believed that Fitch had had any injury of the eyes there could be no recovery;" and that "if they believed that there existed at any time prior to the application either a disease or any injury of the eye there could be no recovery." Also, to the exclusion of evidence that Fitch committed suicide. Other exceptions were taken, and appear in the case, but if the positions upon which they are founded are sound, they are available under the motion for a nonsuit, and have been so treated on the argument and will be here considered in that connection.

The motion for a nonsuit was made upon the ground that by the undisputed and uncontradicted evidence it appeared that Fitch, in the application he made for the policy, made misrepresentations as to certain facts, and concealed and withheld certain other facts, which, under the terms of the policy and of the application necessarily made it void.

It is claimed on the part of the defendant that the statements contained in the application were warranties and must be absolutely true; that it was not for the jury to pass upon the question whether they were material to the risk, nor whether the applicant made any intentional misstatement; that the only question is whether or not the statements were true, and that if any untrue statement (except as to ancestry) was made in the application, the plaintiff cannot recover, and that it is wholly unimportant whether or not the matter as to which the untrue statement was made had any tendency to increase

[20] The statement of facts is omitted.

the risk or any connection with the cause of death, or whether the statement was known to the applicant to be untrue.

The first question to be considered is whether the statements contained in the application were absolute warranties or mere representations, and whether under the terms of the policy and application, the warranty therein mentioned was not, in effect, simply that the statements were made in good faith. Although the term "warranty" is used in both instruments, it must be construed with reference to the other language employed in the same instruments. These instruments were prepared by the defendant, and themselves explain the degree of responsibility to be assumed by the applicant in answering the questions propounded to him. Although the word "warranty" is employed, yet, if the explanations accompanying that term show that a strict warranty was not intended, these explanations given by the defendant itself in the papers, and which induced the applicant to undertake to answer the questions and enter into the contract, must govern.

The application begins with a preamble headed "Explanation;" this explanation describes the nature of life insurance and defines the terms "insured" and "assured;" it then proceeds to state that the policies of this company are made in entire, unconditional honest good faith, and that it is required as a condition that the application be made in equal good faith; that if it is, and the conditions fulfilled, premiums paid when due, etc., "all of which is easily done when the intention is good, the assured may confidently rely upon the prompt payment of the assurance by this company as one of the most certain of human events; the assurance can be jeopardized only by dishonesty or inexcusable carelessness on the part of the applicant, since each question and answer is easily made correctly if only truthful; 'I do not know' is as proper at one time as 'yes' or 'no' at another; * * * the sole object is to protect the honest from the effects of misstatements, not only of themselves but of others, by having every thing so plain that it will be clearly evident that a misstatement can be made by intention only." It then proceeds to propound questions as to the grandparents, parents, uncles and aunts on the paternal and maternal sides, whether living or dead; their health when living, ages at death, causes of death, weight, height, complexion, color of hair, beard and eyes, and various other questions concerning them. Then follow a great number of questions of the most minute character touching the insured, his constitution, habits, etc., and, among other things, as to his weight; how much increase or diminution in weight in one year, and in five years; what diseases he has had, including those of childhood; whether any place where he has ever lived was subject to any disease, and what; as to his habits, how often he bathes; whether he rises and retires regularly; whether late or early; what he wears next his skin; what kind of stimulants he uses, if any; whether he takes his tea or coffee weak or strong; the extreme number of glasses of ale, beer or cider or wine he takes in a

day; the quantity he takes in a month; whether he has ever been intoxicated and how often; whether the action of his bowels is regular every day; whether he has any practice tending to impair health, etc.; whether his vocation endangers life or health; what it will be; whether he has reason to think that his residence, vocation or any circumstance affecting him will be more hazardous to life and health than is at present the case; whether his hands and feet are usually warm or cold; whether any kind of food usually produces ill health or indigestion; whether he has ever had any of a long catalogue of diseases, many of which are of a character which he might well have had without knowing it, and which he might naturally deny ignorantly; whether he has ever had any disease of or injury to any organ or has ever had any symptoms of disease of any organ; whether he is acquainted with the laws of health and whether he takes pains to observe them, and a host of other questions which no human being could with safety undertake to answer accurately and warrant the correctness of his answers. Then follow questions as to his knowledge of the conditions of the insurance, and among these whether he is aware that any fraud will vitiate the insurance; but he is not asked whether he is aware that any unintentional mistake in answering any of the host of questions thrust at him, whether material to the risk or not, will be a breach of warranty, and vitiate his policy.

The applicant is required to answer the questions thus propounded by making upon or over each question conventional marks one of which signifies yes or good or positive; one no or bad or negative; double of either, very or decidedly; one medium, and the other do not know.

This document which the applicant is required to sign, concludes with a declaration that his answers to the questions and the written statements in the preceding statement, declaration or warranty, together with the statement made to the examining physicians and signed, are warranties correct and true, and that there is not concealed, withheld or unmentioned therein any circumstance in relation to the past or present state of the health, habits of life, condition or intentions of the applicant, nor any fact concerning his relatives or ancestry with which the company ought to be made acquainted (without specifying what is the nature of such last-mentioned facts); also that the statements, etc., shall be the basis and form part of the contract or policy and if not in all respects true and correct the policy shall be void.

This application was signed by Fitch, the questions being wholly or in part answered by means of the stipulated hieroglyphics, and a policy was thereupon issued on his life in favor of the plaintiff as assured for $3,000. This policy contains a declaration on the part of the company that it is issued in entire unconditional honest good faith and with the just intent of scrupulously fulfilling all the conditions and engagements of the contract with absolute certainty, and then

proceeds to state that fraud or intentional misrepresentation violates the policy and that the statements and declarations made in the application are warranties and in all respects true, and do not suppress or omit any fact relative to the insured affecting the interest of the company or which whether material or not would tend to influence the company in taking the risk. To this policy is annexed a notice to the policyholders of the conditions of the insurance, one of which is that proofs of the loss may be presented at any time, but that as the payment will be contested only in case of fraud it is agreed and provided in order that facts may be fresh and attainable, that no action on the policy shall be sustainable unless commenced within twelve months after the decease of the insured.

It seems to us, looking at all these papers together and considering the character of the minute inquiries made of the applicant, the extravagance of supposing as to many of them that any one could undertake to answer them categorically as required and warrant the answers, or at most do more than express an opinion concerning the subject of them; coupled with the repeated professions of good faith on the part of the company and exhortations to like good faith on the part of the applicant, and the declarations that if the application is made in good faith equal to that professed by the company, and the conditions fulfilled, premiums paid, etc., the assured may confidently rely upon the prompt payment of the assurance by the company as one of the most certain of human events; that the assurance can be jeoparded only by dishonesty or inexcusable carelessness on the part of the applicant; that the sole object is to protect the honest from the effects of misstatements by having everything so plain that a misstatement can be made by intention only; that fraud or intentional misrepresentation violates the policy, and that the payment will be contested only in case of fraud; the true construction of the papers is that the policy is to be void only in case of intentional and fraudulent misrepresentation or suppression of facts by the applicant, and that although the term warranty is used, yet its legal effect is so modified by the explanations and declarations by which it is accompanied, that it imports no more than an assurance that the statements are made honestly, in good faith, and are believed by the applicant to be correct and true. These explanations and declarations are so inconsistent with the legal effect of a warranty, in the strict legal sense of the term, that both cannot stand together; and to hold the applicant to the strict rules applicable to warranties, would be to entrap him into an agreement which he never intended to make. The statement that payment of the loss will be contested only in case of fraud, is one easily comprehended by every man of ordinary understanding; and, together with the other plain declarations, explanations and assurances contained in the papers, must have been intended, and were calculated, to inspire confidence in applicants for insurance and to

induce them to believe that an unintentional and honest mistake or omission on their part, in traveling through the maze of complicated questions put to them, would not be taken advantage of by the company. Where a warranty is understandingly and clearly given by an insured, no matter how immaterial the fact warranted may be, he will be held strictly to his contract. But when thrown off his guard and induced to enter into such a contract by declarations of the insurer, such as appear in this case to have been contained in the papers prepared by the defendant and evidencing the contract, the declaration in the same papers that the statements are warranties and the basis of the contract, etc., must be so construed, if possible, as to harmonize with the explanations and declarations of the insurer; and if this is not possible they should be rejected.

Under this view of the contract it was necessary, in order to sustain the defense, to show not only that the statements were untrue, but that they were known by the insured so to be, and that they and the alleged omissions were made intentionally and with a fraudulent design; and to entitle the defendant to the nonsuit asked, it was necessary that this fraud should be so conclusively proved that there was no question for the jury.

There was some evidence tending to show fraud in the statement and in omitting to mention certain facts, but this evidence was, in our judgment, far from being of that conclusive character and so uncontroverted as to have justified the judge in nonsuiting the plaintiff. The main facts relied upon were, that some six years before the policy was applied for the deceased had had an inflammation of the eyes, termed by the physicians conjunctivitis. The evidence tended to show that this was caused by some sand being thrown in his eyes while in the army, in 1864, and that he had been discharged from the army for this cause; that this conjunctivitis was merely a temporary inflammation of the eye, of which he had been long since cured, and that it was not calculated to affect the duration of life; that he had been confined in the hospital, in Virginia, by reason of this inflammation of the eyes, in October, 1864, when he was furloughed, and that he was treated for the same complaint by a Dr. Benson, in November, 1864, and was finally discharged from the army in May, 1865.

It was attempted to be proved that his eyes bore traces of his having had iritis at some period of his life, but this proof was controverted by evidence, and therefore would not have justified a nonsuit. The policy was issued in November, 1870, and it is not claimed that he then had any disease of the eye. The application contained an inquiry, whether the deceased "had ever had any illness, local disease or injury in any organ," which question he answered in the negative. This is claimed to have been a misrepresentation and breach of warranty, by reason of which the plaintiff should have been nonsuited.

The president of the defendant, who appears to have been a physician, enumerates about fifty parts of the human body which come un-

der the denomination of organs, including among others the eye, the nerves, bones, cartilages, veins, glands of the skin, etc.; and it is claimed by the defendant that an injury to or disease of any of these organs at any previous period necessarily rendered the answer given by the deceased a breach of warranty or a misrepresentation which should avoid the policy. If a finger had been broken, the skin injured or a vein cut at any period of the applicant's life, the policy would, according to this doctrine, be void.

We think that, according to the construction which we have put upon the contract in question, the judge would not have been justified in holding that the omission to mention a temporary injury to the eye by sand being thrown into it, which had produced inflammation six years before the policy was applied for, and which was then cured, was conclusive evidence of fraud, or a breach of warranty sufficient to avoid the policy. If of any importance it was at most evidence of fraud, to be submitted to the jury.

These policies are provisions made, usually, by persons of slender means, for the benefit of their families in case of death; they sometimes devote their small savings for many successive years to paying the premiums. To justify us in holding that all the answers given to the multitude of questions asked in the case before us are warranties, and that a mistake or unintentional omission as to any of them should avoid the policy, the clearest, most unequivocal and unqualified language should be employed in the policy and conditions. A company cannot be permitted in the same papers to say to the assured, to induce him to enter into the contract, that nothing but fraud or intentional misstatements shall avoid his policy, or that payment will be contested only in case of fraud, and when the claim for payment is presented, to set up as a defense a merely technical breach of warranty in relation to some trivial matter. In a case like this, considering the number and character of the inquiries made of the insured, if the answers were all held to be warranties, it would, in substance, be optional with the company whether to pay or not, for it would be a marvel if some flaw could not be found in the application. No intelligent person would knowingly invest his earnings in so precarious a security.

Another alleged ground of nonsuit was the response of the applicant to the question: "Family physician, and each one who has ever given the party medical attendance? If neither exists, name some medical man, an acquaintance, who knows the party well." The answer was: "Have none." This answer was upon its face incomplete. It applies only to the call for the name of the family physician. Whether the suppression of the name of Dr. Benson, who had attended the applicant for inflammation of the eyes, in November, 1864, and again, in 1867, for some other complaint not mentioned, and of the doctor who was called in to visit his boy in 1870, and attended him twice, at Troy, were fraudulent suppressions, were questions for the

jury. If the defendant had desired a fuller answer to the question it should have insisted upon it at the time.

The same remarks apply to the statements of the applicant as to his vocation, his residence, and to the question whether he had been medically examined for the army or navy, or with reference to insurance, and to his omission to mention the fact of his discharge from the army. There was no such conclusive evidence of fraud or intentional misrepresentation as required the court to pass upon the fact. The refusals to charge as requested are covered by the remarks already made; and this disposes of all the material exceptions except the rejection of evidence that Fitch, the deceased, committed suicide.

The policy contained no stipulation that it should be void in case of the death of the insured by suicide. It was not taken out for the benefit of Fitch but of his wife and children. Although they were bound by his representations, and any fraud he may have committed in taking out the policy, the policy having been obtained through his agency, yet they were not bound by any acts or declarations done or made by him after the issue of the policy, unless such acts were in violation of some condition of the policy. We have examined the various grounds upon which the defendant claims that this evidence was admissible, but are of opinion that they are not sufficient.

The order of the General Term should be reversed and the judgment entered upon the verdict affirmed, with costs. All concur except CHURCH, C. J., and FOLGER, J., not voting.

Order reversed, and judgment accordingly.

CHAPTER VI

WARRANTIES

SECTION 1.—MARINE INSURANCE

OF NONCOMPLIANCE WITH WARRANTIES.

(Park, Insurance [3d Ed. 1796] p. 318.)

A warranty in a policy of insurance is a condition or a contingency, that a certain thing shall be done, or happen, and unless that is performed, there is no valid contract. It is perfectly immaterial for what view the warranty is introduced; or whether the party had any view at all; but being once inserted, it becomes a binding condition on the insured; and unless he can show that he has literally fulfilled it, or that it was performed, the contract is the same, as if it had never existed. * * *

We have said that a warranty must be strictly and literally performed; and therefore whether the thing, warranted to be done, be or be not essential to the security of the ship; or whether the loss do or do not happen, on account of the breach of the warranty, still the insured has no remedy: because he himself has not performed his part of the contract, and if he did not mean to perform, he ought not to have bound himself by such a condition. And though the condition broken be not, perhaps, a material one, yet the justice of the law is evident from this consideration: that it is absolutely necessary to have one rule of decision, and that it is much better to say, that warranties shall in all cases be strictly complied with, than to leave it in the breast of a judge or jury to say, that in one case it shall, and in another it shall not. The very meaning of a warranty is to preclude all inquiries into the materiality, or the substantial performance of it: and although sometimes partial inconveniences may arise from such a rule; yet upon the whole, it will certainly produce public salutary effects.[1]

JEFFERIES v. LEGENDRA.

(Court of King and Queen's Bench, 1691. 4 Mod. 58; s. c., 3 Lev. 320, Carthew, 216, Holt, 465, 1 Shower, 320, 2 Salk. 443.)

An action on the case was brought by the plaintiff upon a policy of assurance of goods from London to Naples upon the ship called the Olive Branch. The adventure was to begin at the time of the lading

[1] See The History of the Development of the Warranty in Insurance Law, 20 Yale Law Journal, 523-534.

of the ship at London, and seven guineas was the premium for every one hundred pounds insured, dangers of the seas only excepted. At the bottom of this policy, these words were subscribed upon which the question now arose, viz. "warranted to depart with convoy." The plaintiff in his declaration averred that the ship did depart with convoy; that she was taken by the French; and that the defendant had notice of it, but did not pay the money, &c.

Upon non assumpsit pleaded, the jury found a special verdict to this purpose, viz.: They find the policy of assurance; that the defendant subscribed it; that the ship departed out of the River Thames under the convoy of a man of war; that about the Isle of Wight she was separated from the convoy by bad weather, and put in at Torbay, and was there detained by contrary winds; that the master of the ship expecting to meet the convoy departed out of the harbour, but could not meet her, being hindered by stress of weather; and that the ship was taken by the French, and so lost, etc.

The question was, What the true meaning of those words are, viz. "warranted to depart with convoy"? [2]

CURIA. If the insured have acted contrary to the agreement, the policy fails as much as if there had been a deviation. The word "depart" is only terminus a quo; if the ship had departed from London, and come back again by fraud, that had been no departure within the intention of this agreement. But upon this departure, as it is found, the voyage was begun with convoy; they were afterwards separated by stress of weather, and both endeavoured to save themselves, and afterwards to find out each other.

And there being no fraud found in the master, judgment was given for the plaintiff, though it might have been otherwise if the convoy had run from the ship, and by that means she had been taken.[3]

LETHULIERS' CASE.

(Court of King's Bench, 1692. 2 Salk. 443.)

Action on a policy of insurance by the defendant at London, insuring a ship from thence to the East Indies, warranted to depart with convoy; and shews, that the ship went from London to the Downs, and from thence with convoy, and was lost. After a frivolous plea and demurrer, the case stood upon the declaration; to which it was objected, that here was a departure without convoy.

ET PER CUR. The clause, "warranted to depart with convoy, must

[2] Arguments of counsel are omitted.

[3] As to the construction of warranties "to depart with convoy," see, further, Lilly v. Ewer, 1 Doug. 72 (1779); D'Eguino v. Bewicke, 2 H. Bl. 551 (1795); Anderson v. Pitcher, 2 B. & P. 164 (1800); Veedon v. Wilmot, Park, Ins. (6th Ed.) 444 n.; Hibbert v. Pigou, Park, Ins. (6th Ed.) 443, post, p. 380.

be construed according to the usage among merchants, i. e. from such place where convoys are to be had, as the Downs, &c.

HOLT, C. J., contra: We take notice of the laws of merchants that are general, not of those that are particular usages. It is no part of the law of merchants to take convoy in the Downs. Vide Yelv. 136.

WOOLMER v. MUILMAN.

(Court of King's Bench, 1763. 3 Burr. 1419; s. c., 1 W. Bl. 427.)

This was a special case reserved, at nisi prius at Guildhall, before Lord Mansfield, for the opinion of the court.

It was an action on the case brought for the recovery of a total loss on a policy of insurance made on goods and merchandizes on board the ship Bona Fortuna, at and from North Bergen to any port or places whatsoever, until her safe arrival in London.

It was underwritten thus—"Warranted neutral ship and property."

The defendant underwrote the said policy for £150. on the 23d day of September, 1762.

The defendant having pleaded the general issue, and paid into court the premium received by him for the said insurance, this cause came on to be tried at Guildhall, London, on the 21st day of May, 1763, before Lord Mansfield: When it was admitted that the plaintiffs had interest on board the ship to a large value, to wit, to the amount of the sum insured.

The ship, with the goods and merchandizes so loaden and being on board her, after her departure from North Bergen, and before her arrival at London, proceeding on her voyage, was by the force of winds and stormy weather wrecked, cast away, and sunk in the seas; and the said goods and merchandize were thereby wholly lost.

It was expressly stated, "That the ship or vessel called the Bona Fortuna, at and before the time she was lost, were not neutral property, as warranted by the said policy."

The question therefore was, "Whether the plaintiffs can, under the circumstances of this case, recover in this action."

Mr. Wallace was for the plaintiff, and Mr. Yates for the defendant. But

Lord MANSFIELD stopped Mr. Yates; and said it was too plain to argue.

This was no contract: For, the man insured neutral property: And this was not neutral property. Therefore we must give

Judgment for the defendant.

BEAN v. STUPART.

(Court of King's Bench, 1778. 1 Doug. 11.)

The plaintiff insured the ship called the Martha, at and from London to New York, the voyage to commence from a day specified; and, on the margin of the policy, were written these words, "Eight nine-pounders with close quarters, six six-pounders on her upper decks, thirty seamen, besides passengers." The ship sailed from the Downs on the 1st of March, and was taken on the 10th, by an American privateer, and was sent, with a prize-master on board, to make the port of Boston. On the 30th of May, the plaintiff brought this action against Stupart, an underwriter on the policy; on which Stupart paid the premium into court, and pleaded the general issue. About the 6th of July, and before the trial, accounts were received that the ship had been retaken some time in May and carried into Halifax.

The cause came on for trial before Lord Mansfield, and a special jury, at Guildhall, at the sittings after Trinity Term, 18 Geo. III. The defence set up was, that there were not thirty seamen on board the ship, according to the terms of the stipulation in the margin of the policy: and, in fact, it appeared upon the evidence, that, to make up that number, the plaintiff reckoned the steward, cook, surgeon, some boys, and apprentices, and some persons described as men learning to be seamen; and that only twenty-six persons had signed the ship's articles. It also appeared that there were seven or eight passengers on board.

Bearcroft, of counsel for the defendant, contended—That this was a warranty, not a representation, and that being so, it must be literally and strictly complied with. That seamen meant men trained to the occupation of mariners, either such as are called able-bodied, or at least ordinary seamen, in opposition to landmen, and could never include boys, or the steward, cook, and surgeon, of a ship. That, at any rate, none but those who had signed the articles were to be considered as seamen, and then the number warranted was not compleat. That, in the late case of Pawson against Ewer [Pawson v. Watson, 2 Cowp. 785, ante, p. 318], it had been determined, that the strict words of a representation need not be fulfilled, provided the departure from them is not materially to the prejudice of the insurers, but that, in the case of a warranty, it is otherwise, that being a condition, and taken as part of the policy; and that the circumstance of the stipulation, in this instance, being written on the margin, made no sort of difference. He said the nature of the voyage, which was of a very dangerous sort, explained the condition, and that real seamen must have been meant. He also argued (though but slightly) that, whatever might be the construction of the policy, the plaintiff was not entitled to recover as for a total loss, because the ship had been retaken, and had never been infra præsidia hostium. Witnesses were examined to explain what is

generally understood by the word seamen, and it was either in proof, or admitted, that, at the custom-house and Greenwich hospital, boys are included in that word.

Lord MANSFIELD observed, in summing up to the jury, that the import of words must be collected from the subject, to which they are applied. That if, in the present case, the insured had stipulated for thirty seamen, besides boys and landmen, then it would have been clear that the terms had not been complied with; but that, in this policy, seamen were contrasted with passengers, and, in that sense, the word seemed to include boys as well as men: but he left the construction to the jury.

The jury having found a verdict for the plaintiff as for a total loss, the defendant, in this term, obtained a rule to shew cause why there should not be a new trial.

On the day for shewing cause, Lord MANSFIELD, after reporting the facts as above related, and that he had left the construction of the word "seamen" to the jury, observed that he himself had thought there was little doubt on the question, after what had passed in the cause of Pawson v. Ewer. That the warranty might have been so worded as only to include able seamen (as if seamen had been opposed to landmen); but that, as expressed here, the contract being with passengers, the whole of the crew or ship's company appeared to be meant. That this was the general maritime sense of the word.

Bearcroft, and Lee, argued in support of the rule for a new trial. They observed, that, although the Solicitor General, who had conducted the cause for the plaintiff, had not opened the stipulation in the policy expressly either as a warranty, or as a representation, but had insisted that it had been complied with, his lordship had assumed it to be a warranty; as they said it certainly was. That, being a warranty, the case of Pawson v. Ewer did not apply. That the sense of the word "seamen" is well understood, and the distinction between seamen and landmen or boys, as fully established as that between clergymen and laymen. That a seamen is only such a person as is liable to be pressed. As to the question, whether it was a total or an average loss, they cited the case of Hamilton v. Mendez, B. R. T., 1 G. III, 2 Burr. 1198, and contended, that the jury had never taken that point into their consideration.

Lord MANSFIELD. The whole argument for the defendant turns upon begging the question. There is no doubt, but that this is a warranty. Its being written on the margin makes no difference. De Hahn v. Hartley, 1 T. R. 343. Being a warranty, there is no doubt but that the underwriters would not be liable, if it were not complied with, because it is a condition on which the contract is founded. But the question is, whether, in this warranty, the word "seamen" was used in the strict literal sense or not. If it was, the warranty has not been complied with. It is a matter of construction. Boys are reckoned seamen, not only at the custom-house, and Greenwich hospital, but in

the distribution of prizes. I think the parties were not sanguine at the trial. The special jury, and the bye-standers, were perfectly clear. They hardly seemed to think it a serious question in this cause. There is scarcely now such a thing as a ship entirely manned with seamen strictly so called. Even on board the King's ships, they are satisfied with a few strict seamen, and able-bodied landmen make up the rest of the crew. I had no doubt of the sense of the word in this policy, and the jury decided it. With regard to the other question, it was stated as a forlorn hope; but certainly, when the action was brought, there was no prospect of a recapture of the ship; she was considered as totally lost in a remote part of the world. The report which afterwards prevailed of her being retaken, some months after the capture, was loose and general; no circumstances known, no account of her situation, nor of what part of the cargo might be saved. In short there is no doubt, but that it was a case where the owner might abandon.

The rule discharged.

VEZIAN v. GRANT.

(Nisi Prius, 1779. Park, Ins. [3d Ed.] 326.)

On the 8th of December, 1777, a policy was underwritten by the defendant on goods in a French ship, Le Comte de Trebon, "at and from Martinico to Havre de Grace, with liberty to touch at Guadaloupe; warranted to sail after the 12th of January, and on or before the first of August, 1778." The insurance was made by the plaintiff on account of Jacques Horteloupe and Louis Delamare, of Havre de Grace, owners of the ship and cargo; at which time it was not known whether she would load at Martinico or Guadaloupe, they having goods to come from both places; the policy was therefore intended to cover the risk from both, or either of them. The ship, having finished her outward voyage at Martinico, sailed from thence on the 6th of November, 1777, for Guadaloupe, where she took in her whole loading, without returning to Martinico, which the captain intended to do, had he not got a complete cargo at Guadaloupe; from whence she sailed on the 26th of June, 1778, and was taken on the 3d of September. The plaintiff demanded payment of the loss from the underwriters, which being refused, he brought actions against them for the recovery thereof. This cause came on to be tried at Guildhall, before Mr. Justice Buller, when the defendant's objections were, that, according to the words of the policy, the voyage was to commence from Martinico, and not from Guadaloupe; and that the warranty of the time of sailing was not complied with, the ship having sailed from Martinico before the 12th of January 1778, to wit,

on the 6th of November 1777. The jury, under the direction of the learned judge, were of that opinion, and accordingly found a verdict for the defendant.[4]

KENYON v. BERTHON.

(Nisi Prius, 1779. Park, Ins. [3d Ed.] 322.)

In an action on a policy of insurance, it appeared that the following words were written transversely on the margin of the policy: "In port 20th July, 1776." In fact, the ship had sailed the 18th of July. The question was, whether this marginal note was a warranty or a representation.

Lord MANSFIELD. The question is, whether the ship's being in port on the 20th is part of the condition of the instrument. When it is on the face of the instrument, it is a part of the policy; so that here, if the ship was not in port, it is no contract. As to its being only in the margin, that makes no difference; it is all part of the contract when it is once signed. And though the difference of two days may not make any material difference in the risk, yet as the condition has not been complied with, the underwriter is not liable.[5]

[4] Warranties of time of sailing have always been strictly enforced. Breach of such a warranty is not excused by impossibility of performance, as where time of sailing was delayed because of an embargo. Hore v. Whitmore, 2 Cowp. 784 (1778). See, also, as to construction of warranties of sailing time, Cruikshank v. Janson, 2 Taunt. 310 (1810); Bond v. Nutt, 2 Cowp. 610 (1777); Thellusson v. Fergusson, 1 Doug. 361 (1780).

In the West India trade the "summer risks," from January 12 to August 1, are esteemed by underwriters much less perilous than the "winter risks" falling in the remainder of the year. See Arnould, Mar. Ins. § 641.

[5] "At the sittings at Guildhall after M. 19 Geo. III, in a cause of Kenyon and Another v. Berthon, Doug. 12, note (1778), the following words were written transversely on the margin of the policy: 'In port 20th of July, 1776.' The ship was proved to have sailed the 18th of July, and Lord Mansfield held that this was clearly a warranty; and though the difference of two days might not make any material difference in the risk, yet as the condition had not been complied with, the underwriter was not liable. But (1) though a written paper be wrapt up in the policy, when it is brought to the underwriters to subscribe, and shewn to them at that time; or (2) even though it be wafered to the policy at the time of subscribing, still it is not, in either case, a warranty, or to be considered as part of the policy itself, but only as a representation. The first of those points occurred in a cause of Pawson v. Barnevelt, Thursday, July 25, 1779, tried before Lord Mansfield at Guildhall at the sittings in Trinity Term, 18 Geo. III, where the policy was the same as in the case of Pawson v. Ewer [Cowp. 785 (1778)]. The counsel for the defendant offered to produce witnesses to prove, that a written memorandum inclosed, was always considered as part of the policy. But his lordship said, it was a mere question of law, and would not hear the evidence; but decided, that a written paper did not become a strict warranty by being folded up in the policy. The second occurred in Bize v. Fletcher [Doug. 284], Monday May 31, 1779, infra, M. 20 Geo. III, p. 284, tried at Guildhall, after E. 19 Geo. III, where it appeared that, at the time when the insurers underwrote the policy, a slip of paper was wafered to it, describing the state of the ship as to repairs and strength, and also mentioned several particulars of her intended voyage, which particulars, in the event, had not been complied with. Lord Mansfield ruled, that this was only a representation; and, if the

HIBBERT v. PIGOU.

(Court of King's Bench, 1785. Park, Ins. [3d Ed.] 339.)

This case came before the court upon a rule to shew cause why the verdict, which the defendant had obtained, should not be set aside, and a new trial had. It was an action upon a policy of insurance on the ship Arundel, Captain Mann, at and from Jamaica to London, warranted to depart with convoy. The insurance was at 18 guineas per cent. to return 3 per cent. if the ship sailed on or before the first of August. The facts appearing on the report of Lord Mansfield, who tried the cause, are these: On the 25th of July the Arundel sailed from Morant harbour to Kingston, where she met the Glorieux man of war, Captain Cadogan, who was likewise on his way to join Admiral Graves at Bluefields, in order to take the fleet of merchant ships, which were to sail from thence upon the first of August, under his command, and to convoy them to Great Britain. Captain Mann, upon their meeting in Kingston harbour, asked for sailing orders from Captain Cadogan, who said he had none, not having himself at that time joined the Admiral: but he was sure that Admiral Graves would not sail from Bluefields till the Glorieux joined him. However, if he should have sailed, he, Captain Cadogan, would give Captain Mann sailing orders, and take every care of the Arundel in his power. They proceeded together, and arrived at Bluefields on the 28th of July; but they found that Admiral Graves had sailed two days before. The Glorieux and Arundel then sailed from Bluefields, the former firing guns, giving signals, and behaving in every respect like a convoy.

jury should think there was no fraud intended, and that the variance between the intended voyage as described in the slip of paper, and the actual voyage as performed, did not tend to increase the risk to the underwriters, he directed them to find for the plaintiff, who accordingly had a verdict." Pawson v. Barnevelt, 1 Doug. 12, note 4 (1779).

In Routledge v. Burrell, 1 H. Bl. 254 (1789), and in Worsley v. Wood, 6 T. R. 710 (1796), it was held that the terms of printed proposals referred to in policies under seal became conditions or warranties of such policies. The doctrine of Worsley v. Wood was re-examined and fully approved in London Guarantee Co. v. Fearnley, L. R. 5 App. Cas. 911 (1880).

In many states statutes now require that any writing made a part of the contract shall be actually attached to the policy. For example, see Ritter v. Mutual Life Ins. Co., 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693 (1898).

"Riders."—In Goddard v. East Texas Fire Ins. Co., 67 Tex. 69, 1 S. W. 906, 60 Am. Rep. 1 (1886), it was held, following Bize v. Fletcher, supra, that certain conditions printed upon a slip, or "rider," which was attached to the policy at its margin by mucilage, did not form any part of the contract; neither the policy nor the annexed slip making any reference to the other. It was also noted that the words of the slip did not form such a manifest connection with those in the policy at the point where it was affixed as to show a clear intention to make them a part of the contract. But when the words printed on a "rider" come in proper sequence, and refer specifically to the policy to which it is attached, they are held to be properly a part of the contract. Mascott v. Insurance Co., 68 Vt. 253, 35 Atl. 75 (1896); Jackson v. Assurance Co., 106 Mich. 47, 63 N. W. 899, 30 L. R. A. 636 (1895); Gunther v. Insurance Co. (C. C.) 34 Fed. 501 (1888).

Upon the 5th of August a signal was made, that the fleet was in sight; and on the 7th they joined the fleet off Cape Anthonio. The Arundel was afterwards lost in September, in a dreadful storm, which dispersed the whole fleet, and in which a vast number of the ships perished. Upon this evidence, the jury were of opinion, under the direction of the Chief Justice, that the terms of the warranty had not been performed, and they therefore found a verdict for the underwriters, the defendants. After this question had been fully argued at the bar, the three judges, Mr. Justice Ashhurst being, at that time, one of the Lords Commissioners of the Great Seal, delivered their opinions severally.

Lord MANSFIELD. Though the underwriters and insured are equally innocent; yet I cannot help saying, that now, as well as at the trial, my inclination led me to wish, that the plaintiffs were in the right. But the more it is argued, it is the less liable to dispute. There are hypothetical contracts and conditional contracts. In the former, the contract depends upon an event taking place; there is no latitude; no equity; the only question is, has that event happened. But conditional contracts admit of a more liberal construction. Now the only question upon this contract is, whether this ship has departed with convoy. A great deal must be referred to the usage of merchants. The government appoints a convoy for the trade, and also names a place of rendezvous. Then comes the reference to the usage of merchants; the voyage is begun at Kingston; but the risk only commences at Bluefields. Now though Lord Rodney desires the captain of the Glorieux to take any ships he may pick up in his way, and convoy them to Bluefields; yet the warranty in the policy by the usage, does not require convoy to Bluefields. The second reference to the usage of merchants is, what is esteemed a convoy by merchants? A convoy is a naval force, under the command of that person, whom government has appointed. They trust to the knowledge of government, which must be supposed to be better acquainted with the plans and force of the enemy, and with the strength necessary to repel their attempts. Now this is the general usage, to which matters of this kind are referred. Then let us see what the case is here.

Lord Rodney appoints Admiral Graves to go with ten sail of the line to Bluefields; and from thence to convoy the Jamaica trade to Great Britain. When they come to the place of rendezvous, they take sailing orders from the Admiral, which are essential to convoy, as by them they know the signals, for what places they are to steer, in case of dispersion by storm, or any other just cause. Admiral Graves, on the 26th of July, for reasons best known to himself, thinks he has got all the ships, for which he ought to stay, and proceeds on his voyage. He leaves no order for the Glorieux to follow him to Cape Anthonio; and though it is very true, that it is in the power of the Commander in Chief to change the place of rendezvous, yet in this case it is not true, as was supposed in argument, that Cape Anthonio was

appointed. At the time of sailing from Bluefields, the Glorieux was no part of the convoy; for she did not come there until two days after the fleet was gone.

Upon these facts it did appear to me, and to the jury at the trial, that the warranty was not complied with. I continue of the same opinion now; and that this rule should be discharged.

Mr. Justice WILLES. I cannot perfectly coincide with everything which Lord Mansfield has laid down. The form of the contract is in general words, "to depart with convoy," without mentioning any particular day, or pointing out any specific convoy. The terms of the policy seem to me to have been literally and substantially complied with; for there was no laches on the part of the Arundel; she came with all possible expedition, and was at Bluefields two days before the time appointed for sailing. When Captain Mann found that the fleet was gone, he did everything in his power for the security of the ship; for he put himself under the protection of the Glorieux, which was appointed by Lord Rodney to make a part of the convoy: and it appears in evidence, that in every respect Captain Cadogan behaved as a convoy. I have searched a good deal for cases;[6] and I can only find one in Strange 1250, upon the subject of sailing orders; and I do not think that case goes so far as to say, that sailing orders are essential to a convoy. The loss of the Arundel happened long subsequent to her joining the fleet; and I am therefore of opinion, that the warranty in this policy has been substantially performed.

[The opinion of BULLER, J., concurring with the CHIEF JUSTICE, is omitted.]

Rule discharged.[7]

HYDE v. BRUCE.

(Court of King's Bench, 1783. Marshall, Ins. 249.)

There was a warranty that a ship should have 20 guns, and it appeared that she had in truth 22 guns, but only 25 men, which number is far short of the necessary complement for 20 guns; in an action on the policy it was objected that this warranty implied a competent number of men to work twenty guns, in case the ship should be attacked. But it was determined that the warranty did not include anything not necessarily implied in it.

Lord MANSFIELD said: If a warranty be meant to mislead, it is

[6] In a note attached to the report of the principal case, Park cites the case of Veedon v. Wilmot, decided in 1744, in the time of Lord Chief Justice Lee, in which, under facts strikingly similar, it was held that there was no breach of warranty of departing with convoy, and plaintiff had judgment.

[7] In another action on the same policy against another of the underwriters, it was proved clearly that the Glorieux was in fact a part of the convoy. Thereupon plaintiffs secured a verdict. See Park, Ins. (3d Ed.) 342, note a.

a fraud, as much as a false representation. In this case there is no ground to impute fraud, and therefore the plaintiff is entitled to recover. [8]

DE HAHN v. HARTLEY.

(Court of King's Bench, 1786. 1 Term R. 343.)

This was an action upon promises brought by the plaintiff (an underwriter), to recover back the amount of a loss which he had paid upon a policy of insurance.

Plea the general issue.

The cause was tried before Buller, J., at the sittings after last Easter term at Guildhall, when the jury found a special verdict, which stated,

That the defendant on the 14th June, 1779, at London, gave to one Alexander Anderson, then being an insurance broker, certain instructions in writing to cause an insurance to be made on a certain ship or vessel called the Juno, which were in the words and figures following: "Please get £2000. insured on goods as interest may appear; slaves valued at £30. per head; comwood £40. per ton; ivory £20. per hundred weight; gum copal £5. per pound; at and from Africa to her discharging port or ports in the British West Indies; warranted copper-sheathed, and sailed from Liverpool with 14 six pounders, (exclusive of swivels, etc.) 50 hands or upwards, at 12, not exceeding 15, guineas. Juno—Beaver. S. Hartley and Company, June 14th, 1779."

That the said Alexander Anderson, in consequence of the said written instructions from the said defendant on the said 14th June, 1779, at London aforesaid, etc., did cause a certain writing or policy of assurance to be made on the said ship or vessel called the Juno in the words and figures following: (reciting the policy,) which was upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, etc., of and in the ship Juno, at and from Africa to her port or ports of discharge in the British West Indies, at and after the rate of £15. per cent.

The verdict, after reciting two memoranda, which are not material, then proceeded to state that in the margin of the said policy were written the words and figures following, "Sailed from Liverpool with 14 six pounders, swivels, small arms, and 50 hands or upwards; copper sheathed."

That on the said 14th of June, 1779, and not before, at London aforesaid, etc., the plaintiff underwrote the said policy for the sum

[8] Lord Mansfield's opinion in this case, according to Douglas, is as follows (3 Doug. 213): "A warranty makes a contingency, without which the contract is void. But a representation, if true, is not to have the same effect unless there is fraud."

of £200. and received a premium of £31. 10s. 0d. as the consideration thereof.

That the said ship or vessel called the Juno sailed from Liverpool aforesaid on the 13th October, 1778, having then only 46 hands on board her, and arrived at Beaumaris, in the isle of Anglesea, in six hours after her sailing from Liverpool as aforesaid with the pilot from Liverpool on board her, who did pilot her to Beaumaris on her said voyage; and that at Beaumaris aforesaid the said ship or vessel took in six hands more, and then had, and during the said voyage until the capture thereof hereinafter mentioned, continued to have 52 hands on board her.

That the said ship or vessel in the said voyage from Liverpool aforesaid to Beaumaris aforesaid, until and when she took in the said six additional hands, was equally safe as if she had had 50 hands on board her for that part of the said voyage.

That divers goods, wares, and merchandizes of the said defendant of great value were laden and put on board the said ship or vessel, and remained on board her until and at the time of the capture thereof hereinafter mentioned. And that on the 14th March, 1779, the said ship or vessel while she remained on the coast of Africa, and before her sailing for her port of discharge in the British West India Islands, was upon the high seas, with the said goods, wares, and merchandizes on board her as aforesaid, met with by certain enemies of our lord the now king, and captured by them, etc., and thereby all the said goods, wares and merchandizes of the said defendant, so laden on board her as aforesaid, were wholly lost to him.

That when the said plaintiff received an account of the said loss of the said ship or vessel, he paid to the said defendant the said sum of £200. so insured by him as aforesaid, not having then had any notice that the said ship or vessel had only 46 hands on board her when she sailed from Liverpool as aforesaid. But whether upon the whole matter, etc.

Law, for the plaintiff, was stopped by the court.

Wood, for the defendant,

Admitted, that a marginal note in a policy of insurance may be a warranty; but contended, that this was distinguishable from the case of Bean v. Stupart [Doug. 11, ante, p. 376], and all the other cases on the subject. In the cases decided, it has always been a warranty of a fact relating to the voyage insured: but in the present case, that which is written in the margin has no relation whatever to the voyage; for it relates merely to the force of the ship at Liverpool before the voyage commenced, and is totally unconnected with the risk insured. The insurance is "at and from Africa to her port of discharge in the British West Indies;" and the warranty is from Liverpool; which is antecedent to the voyage insured, and is merely a representation of the state of the ship when she set out on her voyage from Liver-

pool. Then if it be only a representation, it is immaterial whether complied with or not, because it is found by the verdict that the ship was equally safe with the number of hands she had on board, as if she had had the whole number contained in the warranty. The warranty then can only relate to her being copper sheathed: that part indeed was extremely material, because otherwise the risk would have been considerably increased; and that extended to the voyage insured: but the other part of the marginal note was merely a representation, because the manner of sailing from Liverpool was unconnected with the risk insured.

But even if the court should consider the whole as a warranty, it has been substantially complied with.

Lord MANSFIELD, C. J. There is a material distinction between a warranty and a representation. A representation may be equitably and substantially answered: but a warranty must be strictly complied with. Supposing a warranty to sail on the 1st of August, and the ship did not sail till the 2d, the warranty would not be complied with. A warranty in a policy of insurance is a condition or a contingency, and unless that is performed, there is no contract.[9] It is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it is literally complied with. Now in the present case, the condition was the sailing of the ship with a certain number of men; which not being complied with, the policy is void.

ASHHURST, J. The very meaning of a warranty is to preclude all questions whether it has been substantially complied with; it must be literally so.

BULLER, J. It is impossible to divide the words written in the margin in the manner which has been attempted; that that part of it

[9] This and similar statements attributed to Lord Mansfield serve as the basis for the contention that the breach of an executory warranty avoids the policy ab initio, so as to defeat any recovery for damage suffered prior to such breach of warranty. Thus, where a vessel insured at and from a given port, warranted to deport with convoy, while in port suffered an injury clearly within the terms of the policy, does the fact that she deported and made her voyage safely without convoy constitute such an avoidance of the policy as to defeat all right to recover for the damage in port? The English text-writers insist that such is the necessary conclusion. Arnould, Mar. Ins. § 634; 1 Marshall, Ins. (Ed. 1810) 348, 349. But the American authorities take the view that the policy is avoided only from the time of the breach of an executory warranty, without prejudice to any rights that may have previously accrued under the policy. See Hendricks v. Commercial Ins. Co., 8 Johns. (N. Y.) 1 (1811); Taylor v. Lowell, 3 Mass. 337, 340, 3 Am. Dec. 141 (1807); 1 Phillips, Ins. §§ 764, 771; 3 Joyce, Ins. § 1952. The latter view is adopted by the California Civil Code (section 2612) and by the English Marine Insurance Act of 1906 (6 Edw. VII, c. 41), which declares, in section 33 (3): "A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date."

which relates to the copper sheathing should be a warranty, and not the remaining part. But the whole forms one entire contract, and must be complied with throughout.

Judgment for the plaintiff. [10]

LA MESURIER v. VAUGHAN.

(Court of King's Bench, 1805. 6 East, 382.)

This was an action upon a policy of insurance at and from New York to Gibraltar on goods "on board of the good ship called 'the American ship President,' or by whatever other name or names the same ship should be called." The declaration, after stating the policy, averred that the defendant became an assurer of £300. on goods on board of the ship mentioned in the policy; that a large quantity of goods was loaded and put on board of the said ship at New York, to be carried from thence upon the said voyage; and that in the course of the voyage the ship and goods were lost by capture. It was shown at the trial that the plaintiff's clerk was directed to secure the insurance on the ship "The President," and to designate her as American. By the mistake of the broker procuring the insurance, the name of the vessel was given as "The American ship President." At the trial before Lord Ellenborough, C. J., there was a verdict for the plaintiffs. The question reserved for the full bench was whether the plaintiffs ought to be nonsuited, or the verdict to stand.

Lord ELLENBOROUGH, C. J. Certainly a true description both of the name of the ship and of the voyage intended should be observed to the extent which the terms of the policy itself require. But the framers of this policy, contemplating that there might be a mistake in the name given to the ship have added these words, "or by whatever other name or names the same ship should be called:" they have therefore provided for the event which has occurred of a mistake in the name. It is said, however, that giving effect to those words will introduce fraud, and will prejudice the underwriters; but whenever such a case occurs we shall deal with it accordingly. The present is the case of a plain mistake of the broker who effected the policy, who received intelligible instruction to insure goods on board an American ship called The President, but has stated it all as one name of a ship called "The American ship President," instead of stating it as part name and part description. Then it is objected, that the underwriter has by this mistake been deprived of the benefit of a warranty that the ship was American: that is true; but is he not to look at the instrument he subscribes; and if there were no warranty, he would have a higher premium. I did not know that there had been

[10] This judgment was unanimously affirmed in the Exchequer Chamber. 2 T. R. 186 (1787).

any authority upon the subject, but my brother LAWRENCE has found one, which is a decision by Lord C. J. Lee on this very point.

LAWRENCE, J., read the note of the case alluded to:

"Hall v. Mollineaux, (6 East, 385) 17th December, 1744, at Guildhall, cor. Lee, C. J. An insurance was made upon a ship called 'The Leopard, or by whatsoever other name or names the same ship should be called,' whereof was master for that voyage A. B. or whosoever else should be master. Upon the evidence of A. B. it appeared that the ship of which he was master was called The Leonard, and was never called by the name of The Leopard. And it was insisted by the defendant's counsel that this was not the ship insured, it being of another name; and that the words, 'by whatsoever other name or names the same ship should be called,' would not help it; because those words meant where a ship was called by the name in the policy and likewise by some other name; and, not as here, where it was never called by the name in the policy. For the plaintiff it was urged, that the words are 'by whatsoever other name the same ship shall be called'; and therefore it was only necessary to prove the identity, which was done here by Captain A. B., who said that he was the master of The Leonard: and that the name was no more than one description of the ship. And of this opinion was the Chief Justice."

Even without this authority I do not see the mischief which it is supposed may arise to the underwriter in this case. If there had been another ship with the same name as that mentioned in the policy, on board of which the plaintiffs had had goods, there might arise that inconvenience. But if the underwriter cannot be prejudiced by the mistake, the same reason does not apply. And the very circumstance of introducing such words as those relied on into the policy shews the indifference of the underwriter as to the name of the ship. Then as to his being deprived of the warranty by means of this error, he must look to that before he subscribes the policy.

LE BLANC, J., declared himself of the same opinion, and that he was glad to be fortified in it by the authority of the case referred to. And added, that if the decision would induce underwriters and brokers to read policies before they were subscribed, and to see whether what was written contained matter of warranty or description, it would have a good effect.

Postea to the plaintiffs.

LEWIS v. THATCHER.

(Supreme Judicial Court of Massachusetts, 1819. 15 Mass. 431.)

Assumpsit on a policy of insurance, "on property on board the Swedish brig Sophia, from Hayti to her port of discharge in the United States;" the plaintiffs declaring for a total loss, by capture and condemnation by the British.

At the trial of the action before the Chief Justice, the jury found specially, "that the brig Sophia, mentioned in the policy declared on, was, at the time the policy was made, and at the time of the capture alleged, regularly documented as a Swedish vessel; but that she was, in point of fact, at the said time, the property of American citizens, and was so documented to avoid capture by the British; that it was generally understood by underwriters, and particularly by the defendants in this case, that American vessels were frequently documented as Swedish, and that such vessels were insured as Swedish vessels; and it was known to the defendants, when they subscribed the policy, that the vessel mentioned in the declaration was so circumstanced." Upon these facts, the jury returned a verdict for the plaintiff.

The Chief Justice stated that it was proved, at the trial, that property belonging to the plaintiff was on board a brig Sophia, owned and documented as appears in the verdict; and that the vessel, as well as the said property, was condemned in a British court of vice-admiralty, as enemies' property, or otherwise liable to capture and condemnation.

The defendant contended that no proof could be received, to contradict the decree of condemnation; which being overruled, evidence was given, tending to show that the brig belonged to subjects of the king of Sweden, and that she had papers suitable for a vessel of that nation. To this the defendant opposed testimony that the brig, in fact, belonged to merchants of Boston, citizens of the United States. This evidence was objected to by the plaintiff, on the ground that parol evidence ought not to be received to contradict the written documentary title. This also was overruled; and the verdict was returned upon all the evidence offered. If, in the opinion of the whole Court, the evidence was rightfully received, and the action was well maintained upon the facts found in the verdict, respecting the property in the vessel, and the knowledge of the parties, judgment was to be entered thereon; but if, for any cause, the verdict ought to be set aside, a new trial was to be granted, or a nonsuit entered, according to the direction of the Court.

PARKER, C. J., delivered the opinion of the Court. In the case of Higgins v. Livermore, 14 Mass. 106, which was a policy upon the same vessel, it was determined that the phrase, "Swedish brig Sophia," amounted to a warranty that the vessel was in fact a Swede, or at least that she was regularly documented as such. This qualification of the opinion was unfortunate, as it probably led to the present action —in which an attempt is made to recover, although it is agreed that the vessel belonged to American citizens, and was only colorably furnished with the documents tending to prove her a Swede.

We are all of opinion that the warranty is absolute and unqualified, and that parol evidence ought not to have been admitted, to prove that something less than such warranty was intended by the parties to the contract. It would be unfit to admit such evidence, and it is certainly against law so to do; for where there is a written contract

that must be abided by, and the parties should conform their contract to their actual intentions.

There have been cases before us, where the assured has stipulated that the vessel should sail with neutral papers, or be documented as a neutral. In such cases there is no difficulty, the meaning of the parties being clearly understood. But to say, in writing, that they will warrant one thing, and then prove that they meant to warrant something less, would be opening a door to frauds and perjuries which the rules of law have aimed to close.

If what the plaintiff contends for was the true intent and meaning of the underwriters, it may be dishonorable in them to insist upon the strict letter of the contract; but if they claim their bond, the law will give it them. And it is for the public good that parties should know that, when they undertake to stipulate, in writing, in contracts of this nature, they must make the contract speak their real intentions; and not solemnly declare one thing in writing, and then avoid the effect of it by verbal declarations.

The cases mentioned, in which the usage of trade has been held to control the description of a voyage in the policy, are by no means analogous. The underwriter and the assured are both presumed, by the law, to make their contracts with reference to such usages; and they, in fact, make a part of the contract. But there cannot be a usage, by which a warranty that a vessel was neutral should be held to mean that she was not neutral, but only pretended to be so.

Plaintiffs nonsuit.[11]

NELSON v. SALVADOR.

(Nisi Prius, 1829. Moody & M. 309.)

Assumpsit on a policy of insurance on sugars on board the ship George at and from Tobago, "warranted to sail on or before the 1st of August, 1827;" the time of sailing being afterwards altered by the substitution of the 10th of August for the 1st.

F. Pollock for the plaintiffs stated to the jury, that the ship was cleared outwards on the 9th of August, that the whole of her cargo and all her passengers were on board on the morning of the 10th, and that on the afternoon of that day she prepared to leave the port. She was then moored by two anchors. One of them was weighed, some of the sails set, and the ship proceeded about thirty fathoms, by heav-

[11] The fact that in the policy the vessel insured is called by the English translation of her Spanish name is held not to be a warranty that she is English. See Clapham v. Cologan, 3 Camp. 382 (1813). But where the vessel was described as "the good American ship Rodman," it was held that the ship was warranted to be American. Barker v. Insurance Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339 (1811). To the same effect are Baring v. Claggett, 3 Bos. & P. 201 (1802); Baring v. Christie, 5 East, 398 (1804); Lothian v. Henderson, 3 Bos. & P. 499, 516 (1802).

ing in that quantity of the cable of the remaining anchor. When they were about to heave that anchor, the captain observed a very heavy swell setting into the bay, and feared to take his departure lest he should be lost in getting out. Nothing more therefore was done until the morning of the 11th, when the ship actually left the port. She was lost on her way home. The learned counsel said, that the point arising on these circumstances was quite a new one; and the question was, Whether such a warranty meant more than that the ship should be in condition, and ready to sail if the weather permitted? It cannot be required that she should actually sail, to the imminent hazard of the ship and crew; and the underwriters would have had little reason to be satisfied, if she had sailed to fulfill the warranty, and had been lost in getting out of the harbour.

The circumstances opened were then proved.

Sir J. Scarlett, for the defendant. Does not your lordship think the case is over?

Lord TENTERDEN, C. J. I think so; there is no sailing here. The warranty means that the ship shall be on her voyage on the given day. If the circumstances proved amounted to a compliance with it, the ship might be detained by bad weather for a fortnight or more without unmooring; and in that case the risk might be materially altered. The plaintiff must be nonsuited.

His Lordship then turned to the jury, which was special, and said —"I hope, gentlemen, you agree with me;" and several of them immediately expressed their concurrence.

Nonsuit.

COGSWELL v. CHUBB et al.

(Supreme Court of New York, Appellate Division, First Department. 1896. 1 App. Div. 93, 36 N. Y. Supp. 1076.)

PATTERSON, J.[12] The defendants in this action were underwriters on a policy of marine insurance on the steam yacht Fieseen, the property of the plaintiff. The insurance was for the term of one year, beginning April 10, 1893, for $21,000, at which sum the vessel was valued, and these defendants were, by the terms of the policy to pay the 1/100 part of any loss or damage occasioned by any of the perils insured against. On the 9th of September, 1893, while in the lower New York bay, and under way, and in tow of another yacht, she came into collision with a steamship, and was damaged to the extent of about $16,000, and this action was brought to recover the 1/100 part thereof. The trial resulted in a direction to the jury to find a verdict for the defendants, from the judgment entered upon which, and from an order denying a motion for a new trial, the plaintiff has appealed.

[12] Part of the opinion is omitted.

A stipulation of the policy, written in between printed portions thereof, is in the following words: "Warranted to navigate only the inland waters of the United States and Canada and not below the Thousand Islands." It appears in the record that, on the 9th day of September, 1893, the Fieseen, before the collision referred to, went out upon the high seas beyond the Sandy Hook and Scotland lightships, and into the open waters of the Atlantic Ocean; and that fact is set up as a breach of warranty, avoiding the policy, and preventing a recovery thereon. There does not appear to be any doubt, on the evidence, that the vessel, on the 9th of September, had been on the open ocean, at least 10 miles off from the Sandy Hook Lighthouse, to the southward and eastward, as testified by Capt. Wicks, of the Electra, and she was south and southeast of the Scotland light. Capt. Pressey, of the Vamoose, says the Fieseen raced with the boat commanded by him that day, and that the race began about 2 miles to the south and east of the Scotland light, and they ran about 18 miles in varying courses. The witness Bulin says the Fieseen ran about 10 miles east from the Scotland lightship. Mr. Stanwood swears she went about 12 miles east-northeast, directly, from Sandy Hook.

The effect of the whole evidence is that the vessel went out of inland waters. Such waters are canals, lakes, streams, rivers, water courses, inlets, bays, etc., and arms of the sea between projections of land. That ordinary and accepted signification of the words "inland waters" must be considered the sense in which the parties used them in their contract of insurance, unless, by agreement or understanding, some other was assigned to them; and there is nothing in the record to show that a different or wider meaning was intended to be given them. Going to the open ocean, and then returning, was a plain breach of the warranty, the consequence of which was to avoid the policy; for, hard as the artificial rule may be, it is too firmly settled to be questioned that the breach of an express warranty, whether material to the risk or not, whether a loss happens through the breach or not, absolutely determines the policy, and the assured forfeits his rights under it. Chase v. Insurance Co., 20 N. Y. 52; Stevens v. Insurance Co., 26 N. Y. 397; Day v. Insurance Co., 1 Daly, 13; Westfall v. Insurance Co., 2 Duer, 490; 1 Phil. Ins. p. 418, § 762.

It is claimed, however, on the part of the appellant, that the words "inland waters," as used in the policy, are not limited to their ordinary signification, but that a usage existed, respecting the waters frequented by yachts such as the Fieseen, in view of which usage the policy was written, and that the warranty should be construed by that usage, and a broader meaning applied to the words—one that would include in the category of inland waters the roadstead outside of Sandy Hook, and as far as the yacht went out upon the sea on the 9th of September. Evidence of usage to explain, or, rather, to give effect to, the meaning of the policy, is very commonly resorted to in cases of this character; and, as said by Mr. Phillips (1 Phil. Ins. p. 73, §

119), "the subject-matter of marine insurance and other mercantile contracts makes it necessary to go out of the written instruments in order to interpret them."

But before usage can be appealed to there must be proof that there really is a usage,—something existing and in connection with which the underwriter is assumed to have taken the risk. All that is in evidence on the subject is that it is customary for many yachts and other craft, of large and small dimensions, whenever an international yacht race takes place, to accompany the competing boats over an ocean course. This scarcely establishes a usage of the character to qualify an express warranty. International yacht races are of infrequent occurrence. That yachts covered by insurance go upon the ocean to follow them does not appear. This policy was written April 11, 1893. It is not shown that an international yacht race was in contemplation for the year during which the policy was to run. Attending the yacht race at Newport, and the custom of yachts to assemble at that port in the summer for the squadron races, do not establish a usage, for the same reasons. All of this testimony is insufficient to prove that the parties contracted for anything other than what is expressed in the plain and accepted meaning of the words of the warranty.[13]

The further contention is made that, the loss happening after the policy attached, and the breach of the warranty in no wise producing or contributing to the loss, but it being occasioned by independent causes, the plaintiff may recover, notwithstanding the breach. The learned counsel for the plaintiff admits that the English authorities are against this view, as they very decidedly are. The American cases of breaches of implied warranties of seaworthiness, cited on the argument, and in the appellant's brief, do not establish a contrary rule affecting the express warranty contained in this policy. * * *

Judgment affirmed, with costs.[14]

SECTION 2.—FIRE INSURANCE

WOOD v. HARTFORD FIRE INS. CO.

(Supreme Court of Errors of Connecticut, 1840. 13 Conn. 533, 35 Am. Dec. 92.)

SHERMAN, J.[15] It is not necessary to advert to all the points which have been discussed in this case, by the learned counsel. The general rule in regard to what constitutes a warranty, in a contract of insurance, is well settled. Any statement or description, or

[13] Compare with the principal case Hennessey v. Manhattan Fire Ins. Co., 28 Hun (N. Y.) 98 (1882), Greenleaf v. Insurance Co., 37 Mo. 25 (1865), and Wilkins v. Tobacco Ins. Co., 30 Ohio St. 317, 27 Am. Rep. 455 (1876), in which similar provisions were much more liberally construed.

[14] Affirmed on appeal 157 N. Y. 709, 53 N. E. 1124 (1899).

[15] The statement of facts is omitted.

any undertaking on the part of the insured, on the face of the policy, which relates to the risk, is a warranty. Whether this is declared to be a warranty totidem verbis, or is ascertained to be such, by construction, is immaterial. In either case, it is an express warranty, and a condition precedent. If a house be insured against fire, and is described in the policy as being "copper roofed," it is as express a warranty, as if the language had been, "warranted to be copper roofed;" and its truth is as essential to the obligation of the policy, in one case as in the other. In either case, it must be strictly observed. There may often be much difficulty in ascertaining from the construction of the policy, whether a fact, quality or circumstance specified, relates to the risk, or is inserted for some other purpose—as to shew the identity of the article insured, etc. This must be settled, before the rule can be applied. But when it is once ascertained, that it relates to the risk, and was inserted in reference to that, it must be strictly observed and kept, or the insurance is void.

The word "warranted" dispels all ambiguity, and supersedes the necessity of construction. If a house be insured against fire, and the language of the policy is, "warranted, during the policy, to be covered with thatch," the insurer will be discharged, if, during the insurance, the house should be covered with wood or metal, although his risk is diminished; for a warranty excludes all argument in regard to its reasonableness, or the probable intent of the parties. "It is quite immaterial," says Marshall, [on Insurance, 249,] "for what purpose, or with what view, it is made; or whether the assured had any view at all in making it:—unless he can shew, that it has been literally fulfilled, he can derive no benefit from the policy." And he adds, [page 251,] that "it is also immaterial to what cause the non-compliance is attributable; for if it be not in fact complied with, though perhaps, for the best of reasons, the policy is void."

These positions are in conformity with numerous and high authorities, and with the reason of the rule. Parties may contract as they please. When a condition precedent is adopted, the court cannot enquire as to its wisdom or folly, but must exact its strict observance. An entry on the margin of the policy, or across the lines, or on a separate paper, expressly referred to in the policy, will be construed a warranty, if it relates to the risk; that is, if it defines, or, in any respect, limits, the risk assumed. It may, indeed, where the explicit language of a warranty is not adopted, be difficult to ascertain whether, on a fair construction, the clause was meant to define or limit a risk; but when this is ascertained, the insured has no right to dispense with it, or substitute in its place another risk, however advantageous to the insurer. No man can be compelled to adopt a better bargain than his own.

It is immaterial whether the non-performance or violation of the

warranty, be with, or without, the consent or fault of the insured. Its strict observance is exacted, by law; and no reason or necessity will dispense with it.[16]

The argument of the defendants is, therefore, conclusive, if the policy warrants this building to be and continue a paper-mill, and it was not one, at the time of the loss.

In the policy, this establishment is described as "the one undivided half of the paper-mill, which they [the insured] own at Westville, together with the half of the machinery, wheels, gearing, etc.; the other half being owned by William Buddington." If this relates to the risk, it is a warranty. That it does, is evident from the memorandum in the conditions of the policy, where "paper-mills" are enumerated among those articles which "will be insured at special rates of premium:" that is, a paper-mill is the subject of peculiar risks, and is to be insured upon special stipulations. Therefore, the description of this, in the policy, as a "paper-mill," relates to the risk, and is, consequently, a warranty. It is the only subject of insurance; and if it was not a paper-mill, at the time of the loss, the warranty was not kept, and the plaintiffs cannot recover, although the change may have diminished the hazard, and been effected without their knowledge, or against their will.

It is contended, that the paper-mill had become converted into a grist-mill. * * * [The court finds that this contention is not supported by the evidence.] The property insured has not been changed; the warranty has been kept; and the obligations of the defendants have not been impaired, by any increase of hazard, resulting from the alterations in the mill.

We advise that judgment be entered for the plaintiffs.[17]

[16] "When Fowler v. Ætna Fire Ins. Co. first came before us, in 6 Cow. (N. Y.) 673, 16 Am. Dec. 460 (1827), we held that the description, in the policy of the house which contained the goods insured, as a frame house filled in with brick, amounted to a warranty that it was a house answering that description, and that the plaintiffs could not recover, unless the proof strictly sustained the warranty. The well-established principle in marine insurance, that a warranty is in the nature of a condition precedent, and must be fulfilled or performed by the insured before performance can be enforced against the insurer, we held to be equally applicable to fire as to marine policies; we knew of no case or principal which would authorize a different rule of construction in the one case from that which the same terms had uniformly received in the other."—Fowler v. Ætna Fire Ins. Co., 7 Wend. (N. Y.) 270 (1831).

[17] "In Wood v. Hartford Fire Ins. Co., 13 Conn. 533, 545, 35 Am. Dec. 92 (1840), this court seem to have applied the strict technical rules of marine insurance to fire policies, and they accordingly held, that language in a policy as follows: 'Upon the one undivided half of the paper-mill owned by the plaintiff in Westville in New Haven,' under the circumstances, made a warranty, and that the mill must continue to be a paper-mill, neither more nor less, or the policy would immediately become void. This application of the rule, if the court concurred in the views expressed by its organ, seems to maintain the entire similarity between marine and fire policies. And this is undoubtedly true, if it be conceded, that the description and reference in the

O'NIEL v. BUFFALO FIRE INS. CO.

(Court of Appeals of New York, 1849. 3 N. Y. 122.)

O'Niel sued the Buffalo Fire & Marine Insurance Company, in the Recorder's Court of the City of Buffalo, on a fire policy, and had a verdict and judgment. The Supreme Court affirmed the judgment on error brought, and the defendants appealed to this court.

RUGGLES, J. The defendants insured the plaintiff, John O'Niel, against loss or damage by fire, to the amount of $2,000, on his two-story frame building fronting on Ridout and Market streets, in the town of London, Canada West, occupied by the Hon. George J. Goodhue, as a private dwelling. The insurance was for one year from the 26th of April, 1847, on which day the policy bears date. The house was destroyed by fire on the 6th of December of the same year. Goodhue, who occupied the house at the date of the policy, removed from and ceased to occupy it about three weeks before the fire.

It does not appear whether the policy in question was made out according to the written application of the plaintiff, or upon a survey made by the agent of the company. If on a written application, a falsity in the description avoids the policy, according to the printed conditions annexed to it; but by the same conditions the company is responsible for the accuracy of a survey made by its own agent. Assuming that there was a written application by the plaintiff, describing the house as occupied by Goodhue, the description in the policy must be regarded as a warranty of the fact that he was the occupant at the date of the policy, and nothing more. The description imports nothing more. The defendant insists that the description warrants not only that he was the occupant at the date of the policy, but that he was to remain the occupant during the continuance of the risk. But the parties have not thought proper to express themselves to that effect. A warranty may be either affirmative, as where the insured undertakes for the truth of some positive allegation; or promissory, as where the insured undertakes to perform some executory stipulation. Marsh. on Ins. 347. Here was an affirmative stipulation, that the house was then occupied by Goodhue, but not a promissory agreement that he should continue to occupy it. If it had been the intention of the parties to make it a condition that he should remain the occupant during the term of the insurance, it would have been easy to say so, and there

policy, makes a warranty. But we are not aware, that the court meant to hold, that in all cases, everything which gets into a policy, as description or mere reference, whether survey or answers, is an exact warranty, and not representation. This would be a very broad principle of law, of great importance, demanding mature and careful consideration, before we sanction it, and one which we are not called upon to decide, in this case; because, however the general principle may be, here there is no question of the kind for decision."—Ellsworth, J., in Glendale Mfg. Co. v. Protection Ins. Co., 21 Conn. 19, 35, 54 Am. Dec. 309 (1851).

is no good reason in this case for supposing the parties intended what they have not expressed.

The defendants, in support of their construction of the contract, refer us to the cases of marine policies. In those cases, if the vessel insured is described as a Swedish, American or Spanish ship, the description is in most cases held to be a warranty, not only that the vessel is Swedish, American or Spanish, accordingly, but that her documents and papers are in conformity with her nationality, and that she is to remain and be navigated in that character, as long as the risk continues. A marine policy is a commercial contract, and it is construed according to the import of the words as they are understood among merchants. Marsh. 347. Without the proper documents and papers the ship insured would have no national character, and the possession of such papers are, therefore, a part of what is warranted; and the continuance of that character is manifestly material to the risk, and indeed the main object of the warranty; and for that reason it is held to be implied for the purpose of carrying out the clear intention of the parties. If a fact be in plain terms expressly warranted, its materiality to the risk is of no importance; it becomes a condition precedent, although entirely immaterial. But where a circumstance is sought to be included by implication in the warranty, it never can be supposed that the parties intended to include it unless it be manifestly material to the risk. In the case of a marine policy where the vessel was described as a British brig, and the insurance was against the perils of the sea only, and the risk to terminate on capture, it was held that the description in the policy was not a warranty that the brig had a British register and other papers necessary to a national character, because it was in that case immaterial to the risk whether she had or not. Mackie v. Pleasants, 2 Bin. (Pa.) 363.

In the case under consideration there is nothing in the contract of insurance, or in the evidence, to show that the hazard on the house was greater when vacant than if it had been occupied by Goodhue. The rate of insurance is not usually made to depend on such a circumstance, and the continuance of Goodhue's occupation as tenant not being embraced within the words of the warranty, and not being manifestly material to the risk, cannot be brought within it by inference or implication.

The ground of complaint, so far as relates to the point under consideration, is that the house was insured as a private dwelling, occupied by Goodhue, and not as a vacant building; but that it was suffered by the assured to become vacant without the assent of the insurers. On this point the case of Catlin v. Springfield Insurance Company, 1 Sumn. 435, Fed. Cas. No. 2,522, was a much stronger case in favor of the insurers, and yet the plaintiff recovered. The insurance was "on a dwelling house in Vermont, owned by Hayden & Hobart of Burlington, and at present occupied by one Joel Rogers as a dwelling-house, but to be occupied hereafter as a tavern and privileged as such." The ground

of defense was that the building was insured to be occupied; that when burnt it had been a long time vacant, often deserted, derelict, and was destroyed by foul means; and that had the house been occupied as insured, the loss could not have occurred from the cause which destroyed it. It was held that the words in the policy did not constitute a warranty that the house should, during the continuance of the risk, be constantly occupied as a tavern, and that the risk continued although it was vacant. And Mr. Justice Story, in delivering his opinion, said that "the doctrine had never, to his knowledge, been asserted, nor should he deem it maintainable, that a policy against fire on the house of A. in Boston, described as a dwelling-house, would be void if the house should cease for a time to have a tenant." This objection, therefore, to the plaintiff's recovery must fail.[18] * * *

Judgment affirmed.[19]

[18] The remainder of the opinion, dealing with certain conditions in the policy, is omitted.

[19] See, in accord, Cumberland Valley Mut. Protection Co. v. Douglas, 58 Pa. 419, 98 Am. Dec. 298 (1868).

When Words of Description Constitute a Warranty.—The general rule to be deduced from the cases is that when the descriptive words define or qualify the risk they are to be deemed warranties. See Burleigh v. Insurance Co., 90 N. Y. 220 (1882), (building described as "detached at least one hundred feet"); Planters' Ins. Co. v. Myers, 55 Miss. 479, 30 Am. Rep. 521 (1874); Alexander v. Germania Ins. Co., 66 N. Y. 464, 23 Am. Rep. 76 (1876), reversing 5 Thomp. & C. (N. Y.) 208 (1874); Bobbitt v. Liverpool & L. & G. Ins. Co., 66 N. C. 70, 8 Am. Rep. 494 (1872); Keller v. Liverpool & L. & G. Ins. Co., 27 Tex. Civ. App. 102, 65 S. W. 695 (1901). But, when such descriptive words are merely used to designate or identify the subject-matter of the insurance, an erroneous description does not affect the insurance. Howard Fire & Marine Ins. Co. v. Cornick, 24 Ill. 455 (1860); Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123 (Gil. 98) (1871); Cumberland Valley Mut. Protection Co. v. Schell, 29 Pa. 31 (1857); Everett v. Continental Ins. Co., 21 Minn. 76 (1874); Vilas v. New York Central Ins. Co., 9 Hun (N. Y.) 121 (1879); Western & Atlantic Pipe Lines v. Home Ins. Co., 145 Pa. 346, 22 Atl. 665, 27 Am. St. Rep. 703 (1891); Massell v. Protective Mut. Fire Ins. Co., 19 R. I. 565, 35 Atl. 209 (1896); Wilkins v. Germania Fire Ins. Co., 57 Iowa, 529, 10 N. W. 916 (1881).

See cases collected, Vance, Ins. p. 286, note 57; Id. pp. 437, 439; 2 Cooley, Briefs on Insurance, p. 1274 et seq.

The same general principles apply to the description of the location of personal property insured. See Niagara Fire Ins. Co. v. Elliott, 85 Va. 962, 9 S. E. 694, 17 Am. St. Rep. 115 (1889); Longueville v. Assurance Co., 51 Iowa, 553, 2 N. W. 394, 33 Am. Rep. 146 (1879); Kratzenstein v. Assurance Co., 116 N. Y. 54, 22 N. E. 221, 5 L. R. A. 799 (1889); Shivers v. Farmers' Mut. Fire Ins. Co., 99 Miss. 744, 55 South. 965 (1911).

But, when the property is of such character that its use does not necessitate its removal from the place described as its location, the court will infer that the statement of the location was meant to be a characterization of the risk. Lakings v. Insurance Co., 94 Iowa, 476, 62 N. W. 783, 28 L. R. A. 70 (1895); Annapolis & E. R. Co. v. Baltimore Fire Ins. Co., 32 Md. 37, 3 Am. Rep. 112 (1870); English v. Insurance Co., 55 Mich. 273, 21 N. W. 340, 54 Am. Rep. 377 (1884). Thus where a stock of goods is insured as contained in a certain building, it will not be covered by the policy when removed to another place. English v. Insurance Co., 55 Mich. 273, 21 N. W. 340, 54 Am. Rep. 377 (1884).

The language of the standard fire policy, which insures the goods described "while located and contained as described herein, and not elsewhere," ap-

RIPLEY v. ÆTNA INS. CO.

(Court of Appeals of New York, 1864. 30 N. Y. 136, 86 Am. Dec. 362.)

Appeal from the general term of the Supreme Court, in the first district, where a judgment entered upon a verdict in favor of the plaintiff, and an order denying a motion for a new trial, had been affirmed (29 Barb. 552).

The action was upon a policy of insurance issued by the defendants whereby they insured the Glendale Woolen Company against loss or damage by fire to their factory and contents for a term of one year. The premises insured were destroyed by fire between three and four o'clock Sunday morning, April 8, 1849, when no watchman was in the building. The survey attached to the policy contained this question and answer: "Is there a watchman in the mill, during the night?" Answer—"There is a watchman, nights." It was proved that it was not customary for the assured to keep a watchman on the premises from 12 o'clock Saturday night to 12 o'clock Sunday night, and there was some evidence tending to show that defendant's agents who wrote the insurance had knowledge of this custom. Plaintiff sued as assignee of the assured.[20]

MULLIN, J. Much evidence was given on the trial for the purpose of reforming the application for insurance, so that the answers to the questions in regard to the keeping a watchman in the factory should be made to express the understanding of both parties on that subject. But, inasmuch as the learned justice who tried the cause held that the application needed no reformation; that, by its terms, the insured were not bound to keep a watchman in the factory from twelve o'clock on Saturday night until twelve o'clock on Sunday night; the case is relieved of the questions raised on the trial, as to the competency of the evidence given for the purpose of procuring a reformation of the contract, and whether a case was made by the evidence that would have entitled the plaintiff to that relief.

Before proceeding to ascertain what the construction of the clause of the application under consideration is, it is important to know whether it is a warranty or a representation merely.

pears to exclude any question of construction. British America Assur. Co. v. Miller, 91 Tex. 414, 44 S. W. 60, 39 L. R. A. 545, 66 Am. St. Rep. 901 (1898); Village of L'Anse v. Fire Association of Philadelphia, 119 Mich. 427, 78 N. W. 465, 43 L. R. A. 838, 75 Am. St. Rep. 410 (1899). But see De Graff v. Insurance Co., 38 Minn. 501, 38 N. W. 696, 8 Am. St. Rep. 685 (1888), in which a five-year policy on live stock described as in a wood barn was held to cover loss of a horse killed by lightning in another barn subsequently built. See Vance, Ins. p. 440; 2 Cooley, Briefs on Insurance, 1283.

[20] The statement of facts is much abbreviated, and the latter part of the opinion, dealing with plaintiff's claim of waiver of that condition in the policy requiring action upon the contract to be brought within one year, is omitted.

The paper which contained the questions and answers in regard to keeping a watchman in the factory is called, in the policy, a survey, and this survey is expressly referred to in the policy and made a part of it.

Angell, in his work on Fire and Marine Insurance, defines a warranty as being a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends. The stipulation is considered to be on the face of the policy although it may be written on the margin, transversely, or on a subjoined paper referred to in the policy.

What is said on the subject of a watch in the factory is contained in the survey, filled out by the insured and delivered to the agent of the insurer, and the policy refers to and makes this survey a part of itself. It is, therefore, clearly within the definition of a warranty as laid down by the learned author of the treatise cited, as well as that given by our own courts to that term. Jefferson Ins. Co. v. Cotheal, 7 Wend. 73, 22 Am. Dec. 567; Brown v. Cattaraugus Ins. Co., 18 N. Y. 385; Chase v. Hamilton Ins. Co., 20 N. Y. 52.

If at the time the survey was made the factory was not in operation, and the statements contained in it as to the watch kept therein is to be considered promissory rather than an affirmative warranty, yet the rights and duties of the parties are not altered. If the promise has not been kept—the condition precedent performed—the insurer is not bound by the policy. Angell, Ins. § 145; 2 Duer, Ins. 749; 1 Arn. 502.

The clause of the survey being a warranty, it then becomes important to ascertain its construction, in order to determine whether it has been broken. In construing contracts of insurance, effect must be given to the intention of the parties, as in the construction of all other contracts.

The rule is very clearly stated by Lord Ellenborough, in Robertson v. French, 4 East, 135. The same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz.: that it is to be construed according to its sense and meaning as collected, in the first place, from the terms used in it, which terms themselves are to be understood in their plain, ordinary and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same word, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense."

It was of the highest importance to the insurer, in order that it might be able intelligibly to decide whether it would assume

the risk, or, if it assumed it, to fix the premium to be charged, to know whether a watch was kept in the factory proposed to be insured, at what time such watch was kept, and the means, if any, of determining whether he discharged faithfully his duty. The question "Is there a watchman in the mill during the night?" was a very significant one, and the answer, "There is a watchman nights," was a full response to the inquiry. A watch clock being constructed so as to require the watchman to be at it each hour, or his absence would be discovered in the morning, the question whether there was a watch clock was also a very significant one. Their answer was, there was no clock, but the bell was struck every hour, from eight p. m. until it rang for work in the morning, furnished perhaps the next best means of securing watchfulness on the part of the watchman.

The next question to which an answer was required is: "Is the mill left alone at any time after the watchman goes off duty in the morning till he returns to his charge at evening?" To which it was answered: "Only at meal times, and on the Sabbath and other days when the mill does not run."

Fires in the factory might be produced in either of four modes: From fire used in the building, from the friction of the machinery, spontaneous combustion, and by an incendiary. There was no danger from fire used in the building, when the building was not occupied, except for a few hours after each day's work closed, and until it was put out. Nor was there any danger from friction, unless the machinery was in motion; nor from incendiaries, unless when there was no person in the mill; but there was constant danger from spontaneous combustion. A watch in the factory during the night afforded a great security against injury from fire from any cause, in the night; and as the danger existed every night in the week, it was important to the insurers to know whether a watch was on hand every night.

It being important to the insurer to know whether a watch was kept every night, and the question put being general whether a watch was kept during the night, the answer that there is a watch nights, must have been understood to apply to every night. No exception being made in the question, and there being an obvious necessity for a watch every night, both parties must have understood the question and answer to apply to every night. If the insured intended to exclude any night, they should have done it clearly and distinctly. It was no more difficult to say that no watch was kept from twelve o'clock Saturday night to twelve o'clock Sunday night, than it was to exclude the Sabbath in the answer to the next question. And the fact that an exception was made in the next answer, is some evidence that none was intended to be made in the first.

It seems to me quite clear, that the answer "there is a watchman nights," is to be understood to mean there was a watchman in the factory every night. But evidence was given on the trial, of a custom of factories in that section of the country not to keep a watch from twelve Saturday night till twelve o'clock Sunday night, and that the answers are to be construed in reference to such custom. "A custom in order to become a part of a contract, must be so far established, and so far known to the parties, that it must be supposed that their contract was made in reference to it. For this purpose the custom must be established, and not casual—uniform, and not varying—general, and not personal, and known to the parties." 2 Pars. Cont. 53; Dawson v. Kittle, 4 Hill, 107.

Within the above rule it seems there was no such evidence as would authorize the court to find a custom amongst the factories in the vicinity of the one insured which should be permitted to control the language of the contract in question. The answers to the questions in the survey must be interpreted according to the popular meaning of the language used.

[The court here determined that the trial court was in error when it admitted parol evidence to show that the agent of the insurer had been told that no watchman was kept on the premises between midnight Saturday and midnight Sunday, since such evidence would vary the terms of the warranty.]

The next inquiry in order is: Has the warranty been broken? On this subject there is no dispute. It is conceded by the defendant that if the answer to the question as to the watchman cannot be construed as it was construed by the learned judge at the circuit, then it was broken because it is true that no watch was kept from twelve o'clock on Saturday night until twelve o'clock on Sunday night.

The effect of the breach of the warranty is to annul the policy without regard to the materiality of the warranty, or whether the breach had any thing to do in producing the loss.

The effect is very well stated by Marshall, in his work on Insurance, 249. He says: "A warranty being in the nature of a condition precedent, and therefore to be performed by the insured before he can demand performance of the contract on the part of the insurer, it is quite immaterial for what purpose or with what view it is made, or whether the insured had any view at all in making it. But being once inserted in the policy, it becomes a binding condition on the insured, and unless he can show it has been literally performed, he can derive no benefit from the policy. The very meaning of a warranty is to preclude all question whether it has been substantially complied with or not. If it be affirmative, it must be literally true; if promissory, it must be strictly performed. * * * With respect to the compliance with warranties, there is

no latitude, no equity. The only question is: Has the thing warranted taken place or not. If it has not, the insurer is not answerable for any loss, even though it did not happen in consequence of the breach of warranty." * * *

In no aspect of the case am I able to discover any ground on which this action can be maintained. The judgment of the General Term must be reversed, and a new trial ordered, costs to abide the event.

Judgment reversed and new trial ordered.[21]

NATIONAL BANK v. INSURANCE CO.

(Supreme Court of the United States, 1877. 95 U. S. 673, 24 L. Ed. 563.)

Error to the Circuit Court of the United States for the Western District of Missouri.

This is an action on a policy of insurance issued by the Hartford Fire Insurance Company to W. D. Oldham, on certain mill property, building, and machinery, and by him transferred and assigned to the First National Bank of Kansas City, Mo. The parties, by written stipulation, waived a jury; and, upon a special finding of facts, the Circuit Court gave judgment for the company. The bank thereupon sued out this writ of error.

It appears from the special finding that in the application Oldham stated that the building and machinery insured were each worth $15,000, whereas in fact the building was worth only $8,000 and the machinery only $12,000. But the court found that such overestimates were not fraudulent or intentional.

The policy refers to the application in these words: "Special reference being had to assured's application and survey, No. 1462, on file, which is his warranty, and a part hereof."

The policy further recites: "If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this policy, and a warranty by the assured; and if the assured, in a written or verbal application, makes any erroneous representation, or omits to make known any fact material to the risk, * * * then, and in any such case, this policy shall be void. * * * Any fraud or attempt at fraud, or any false swearing on the part of the assured, shall cause a forfeiture of all claim under this policy."

Mr. Justice HARLAN delivered the opinion of the court:

On behalf of the company, it is contended that, under any proper

[21] A similar case, brought on a similar policy issued by another company upon the same property, and involving exactly the same questions of law arising under the same facts, was decided in the same way by the Supreme Court of Errors of Connecticut. See Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19, 54 Am. Dec. 309 (1850).

construction of the contract, the assured warranted, absolutely and without limitation, the truth of the several statements in the application, including the statement as to the value of the property. If this view be sound, the judgment of the Circuit Court must be affirmed; otherwise, it must be reversed.

Our conclusion is that the plaintiff in error, who is the beneficiary of the policy, is entitled to a judgment, notwithstanding the overvaluation of the property by the assured.

The entire application having been made, by express words, a part of the policy, it is entitled to the same consideration as if it had been inserted at large in that instrument. The policy and application together, therefore, constitute the written agreement of insurance; and, in ascertaining the intention of the parties, full effect must be given to the conditions, clauses, and stipulations contained in both instruments.

Looking first into the application, we find no language which, by fair construction, was notice to the assured that, in answering questions, he was assuming, or was expected to assume, the strict obligations which the law attaches to a warranty. There is no intimation anywhere in that instrument that the exact truth of the answers was a condition precedent, either to the consideration of the application or to the issuing of a policy. On the contrary, the application contains the covenant of the assured that he had in that instrument made a just, full, and true exposition of all material facts and circumstances in regard to the condition, situation, value, and risk of the property, so far as known to him. The taking of that covenant, at the threshold of the negotiations, was, in effect, an assurance that a frank statement of all such material facts as were within the knowledge of the applicant would meet the requirements of the company. It was a covenant of good faith on the part of the assured,—nothing more; and, so far as it related to the value of the property, was not broken, unless the estimates by the assured were intentionally excessive. If the case turned wholly upon the construction to be given to the application, it is quite clear that the overvaluation of the property would not defeat a recovery upon the written agreement, since the assured, by the special finding, is acquitted of any purpose to defraud the company. That is equivalent to saying that the assured did not withhold any material fact within his knowledge concerning the condition, situation, value, or risk of the property.

But the difficulty in the case arises from the peculiar wording of the policy, considering the application as a part thereof. While the assured in one part of the written agreement is made to stipulate for a warranty, and in another the policy is declared to be void if the assured "makes any erroneous representation, or omits to make known any fact material to the risk," in still another part of the same agreement—the application—he covenants that, as to all material facts within his knowledge, respecting the condition, situation, value, and

risk of the property, he has made a full, just, and true exposition. If the purpose of the company was to secure a warranty of the correctness of each statement in the application, and if the court should adopt that construction of the contract, there could be no recovery on the policy, if any one of these statements were proven to be untrue; and this, although such statement may have been wholly immaterial to the risk, and was made without any intent to mislead or defraud.

Such a construction, according to established doctrine, might defeat the recovery, even if the overvaluation had been so slight as not to have influenced the company in accepting the risk. But if such was the purpose of the company, why did it not stop with the express declaration of a warranty? Why did it go further, and incorporate into the policy a provision for its annulment in the event the assured should make an "erroneous representation, or omit to make known any fact material to the risk"?—language inconsistent with the law of warranty. Still further, why did the company make the application a part of the policy, and thereby import into the contract the covenant of the assured not that he had stated every fact material to the risk, or that his statements were literally true, but only that he had made a just, true, and full exposition of all material facts, so far as known to him.

It is the duty of the court to reconcile these clauses of the written agreement, if it be possible to do so consistently with the intention of the parties, to be collected from the terms used.

It will be observed, from an examination of the questions propounded to the assured, that, among other things, he was asked whether the building was of stone, brick, or wood; how the premises were warmed; what materials were used for lighting them; whether a watchman was kept during the night; what amount of insurance was already on the property; whether it was mortgaged, &c. These and similar questions refer to matters of which the assured had actual knowledge, or about which he might, with propriety, be required to speak with perfect accuracy. They are matters capable of precise ascertainment, and in no sense depending upon estimate, opinion, or mere probability. But his situation and duty were wholly different when required to state the cash value of his property. He was required to give its "estimated value." His answers concerning such value were, in one sense, and, perhaps, in every just sense, only the expression of an opinion.

The ordinary test of the value of property is the price it will command in the market if offered for sale. But that test cannot, in the very nature of the case, be applied at the time application is made for insurance. Men may honestly differ about the value of property, or as to what it will bring in the market; and such differences are often very marked among those whose special business it is to buy and sell property of all kinds. The assured could do no more than estimate such value; and that, it seems, was all that he was required to

do in this case. His duty was to deal fairly with the company in making such estimate. The special finding shows that he discharged that duty and observed good faith.

We shall not presume that the company, after requiring the assured in his application to give the "estimated value," and then to covenant that he had stated all material facts in regard to such value, so far as known to him, and after carrying that covenant, by express words, into the written contract, intended to abandon the theory upon which it sought the contract, and make the absolute correctness of such estimated value a condition precedent to any insurance whatever. The application, with its covenant and stipulations, having been made a part of the policy, that presumption cannot be indulged without imputing to the company a purpose, by studied intricacy or an ingenious framing of the policy, to entrap the assured into incurring obligations which, perhaps, he had no thought of assuming.

Two constructions of the contract may be suggested. One is to regard the warranty expressed in the policy as limited or qualified by the terms of the application. In that view, the assured would be held as only warranting that he had stated all material facts in regard to the condition, situation, value, and risk of the property, so far as they were known to him. This is perhaps, the construction most consistent with the literal import of the terms used in the application and the policy. The other construction is to regard the warranty as relating only to matters of which the assured had, or should be presumed to have had, distinct, definite knowledge, and not to such matters as values, which depend upon mere opinion or probabilities.

But, without adopting either of these constructions, we rest the conclusion already indicated upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself.

Wherefore, as it does not clearly appear that the parties intended that the validity of the contract of insurance should depend upon the absolute correctness of the estimates of value, and as it does appear that such estimates were made by the assured without any intention to defraud, our opinion is that the facts found do not support the judgment.

The judgment will, therefore, be reversed, and the cause remanded with directions to enter a judgment upon the special finding for the plaintiff in error; and it is so ordered.

VIRGINIA FIRE & MARINE INS. CO. v. MORGAN.

(Supreme Court of Appeals of Virginia, 1893. 90 Va. 290, 18 S. E. 191.)

Error to judgment of circuit court of Tazewell county, rendered at the August term, 1892, in an action on a policy of fire insurance, wherein Samuel Morgan was plaintiff and the Virginia Fire and Marine Insurance Company was defendant. The policy was for $1,500 on a stock of goods. The jury found a verdict for the plaintiff for $1,090.90, and there was judgment accordingly, to which judgment the defendant obtained a writ of error and supersedeas. Opinion states the case.

LEWIS, P., delivered the opinion of the court:

This was an action on a policy of fire insurance issued by the defendant company on the plaintiff's stock of goods in his storehouse at Cedar Bluff, in Tazewell county. The policy recites that it is based upon the written application, signed by the assured, and that "the said application shall be treated as a part of, and be incorporated in, the policy, and that the statements thereof shall be treated as warranties by the assured that the facts therein stated are true."

In the application the assured was asked the following, among other questions, viz.: "State what books of account you keep; will you keep them in an iron safe or secure in another building?" To which the answer was: "Day-book and ledger; yes."

The goods having been destroyed by fire, the company refused payment, on the ground that the assured had not kept his books in an iron safe or secure in another building, but had kept them in a wooden desk in the storehouse, where they were destroyed in the fire. This defence was also set up in bar of the action under the plea of non assumpsit; and at the trial the court was asked in effect to instruct the jury that the answer in the application in regard to the place of keeping the books amounted to a continuing warranty, which, if broken, avoided the policy. But the court refused to so charge, and, on motion of the plaintiff, told the jury in effect that before they could consider the agreement in regard to the books they must believe it was material, and further, that the company was injured by its non-observance.

This ruling was, seemingly, based on the idea that the agreement was not a warranty, but a representation, which is a mistaken view. The stipulation is undoubtedly a warranty, made so by the express contract of the parties, and the jury ought to have been instructed

that a literal compliance with it was essential to a recovery by the plaintiff.

"An express warranty," says May, "is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends. By a warranty the insured stipulates for the absolute truth of the statement made, and the strict compliance with some promised line of conduct, upon penalty of forfeiture of his right to recover in case of loss should the statement prove untrue, or the course of conduct promised be unfulfilled. A warranty is an agreement in the nature of a condition precedent, and, like that, must be strictly complied with." May, Ins. § 156.

This is the language of the decided cases, and of this court in Lynchburg Fire Ins. Co. v. West, 76 Va. 575, 44 Am. Rep. 177.

And the author correctly adds, that whether the fact stated or the act stipulated for be material to the risk or not, is of no consequence, the contract being that the matter is as represented or shall be as promised; and unless it prove so, whether from fraud, mistake, negligence, or other cause, not proceeding from the insurer, or the intervention of the law or the act of God, the insured can have no claim. "One of the very objects of the warranty," he continues, "is to preclude all controversy about the materiality or immateriality of the statement. The only question is, has the warranty been kept? There is no room for construction, no latitude, no equity. If the warranty be a statement of facts, it must be literally true; if a stipulation that a certain act shall or shall not be done, it must be literally performed."

Whether a statement is a warranty or not depends upon the intention of the parties, as does the nature and effect of the warranty, when there is one, which is to be gathered from the language used and the subject matter to which it relates. Parties have a right to make their own contracts, and when the meaning of the contract is ascertained, effect must be given to it. It is not for the court to add to or detract from it, but the contract must be enforced without regard to any hardship, real or supposed, to either party, or whether it is wise or unwise, provident or improvident.[22] * * *

According to the authorities, warranties are of two kinds, viz.: (1) Affirmative, or warranties in presenti, as they are sometimes called, which affirm the existence of certain facts pertaining to the risk at the time of the insurance; and (2) Continuing or promissory. An instance of the first class is Virginia Fire & Marine Ins. Co. v. Buck & Newson, 88 Va. 517, 13 S. E. 973. There the insured, in answer to a question in the application, stated that a watchman slept on the premises at night. On the night of the fire the watchman was absent,

[22] Here is given a quotation from Jeffries v. Life Ins. Co., 22 Wall. (U. S.) 47, 22 L. Ed. 833 (1874), post, p. 418, and Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231 (1894), is cited.

but it was held that the policy was not thereby avoided, because the answer related to the present, and not to the future—in other words, that the statement was manifestly intended merely as affirmative of the usual and existing state of things, and had nothing promissory as to the future. [23] But, as was said in the same case, a promissory warranty—i. e., one which requires something to be done or omitted after the insurance takes effect, and during its continuance—avoids the contract, if not complied with according to its terms.

The present case falls within the latter category, certainly as regards the promise to keep the books in an iron safe or secure in another building. It is quite probable, in the nature of the case, that this stipulation was regarded as material; but whether it was or not—for with that we have nothing to do—the contract is express that the books would be thus safely kept; and if, as is admitted, the promise has not been fulfilled, there can be no recovery.

A warranty may be in part affirmative, and in part promissory. Thus, in an Iowa case the building was described as "occupied for stores below, the upper portion to remain unoccupied during the continuance of this policy." In an action on the policy it was held that so much of the statement as related to the lower portion of the building was an affirmative warranty merely, but that what related to the upper portion was a promissory warranty, which was broken, if, at any time during the life of the policy, that portion of the building was so occupied. Stout v. City Fire Ins. Co., 12 Iowa, 371, 79 Am. Dec. 539.

The main ground upon which the plaintiff relies, in support of the judgment, is a provision in the policy that the same "shall be void if the assured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof;" and further that "this policy is made and accepted subject to the foregoing stipulations and conditions."

This language, it is contended, is inconsistent with the idea of a war-

[23] See, in accord, Hosford v. Germania Fire Ins. Co., 127 U. S. 399, 8 Sup. Ct. 1199, 32 L. Ed. 196 (1888), from which a part of the opinion by Gray, J., may be quoted: "As to smoking, the only question put in the application, and answered in the negative, is whether smoking is 'allowed on the premises'—which looks only to the rule established upon the subject at the time of the application, and not to the question whether that rule may be kept or broken in the future. This appears by the language of the question, as well as by the circumstance that it is not, as other interrogatories as to existing precautions against fire are followed up by compelling the assured to agree that they will continue to observe the same precautions. The jury having found that the assured forbade smoking in the mill, the mere fact that other persons, or even one of the assured, did afterwards smoke there, was not sufficient to avoid the policy. The two cases cited by the defendants from the Illinois Reports contain no adjudication to the contrary. The point decided in each was that smoking by workmen in the mill did not avoid the policy, and the remark of the judge delivering the opinion, that in such a case the assured undertakes that he will not himself do the act, was obiter dictum. Insurance Co. v. McDowell, 50 Ill. 120, 131, 99 Am. Dec. 497 (1869); Insurance Co. v. Eddy, 55 Ill. 213, 219 (1870)."

ranty, and shows that the answers in the application were intended as representations, none of which would avoid the policy, unless false and material to the risk.

The answer to this is that just as a policy may contain both affirmative and promissory warranties, so it may contain both warranties and representations; and the present is a case of that sort. In the application, wherein the applicant affirms and warrants his answers to be true, and agrees that the same shall constitute the basis of the insurance, he was asked as to the dimensions of the storehouse, when it was built, etc. Now, as to the answers to these questions and the like, it would be absurd to say that they are anything more than representations, because they are merely descriptive, and were evidently so intended by the parties. Wood, Fire Ins. § 138. On the other hand, looking, as we must, to the whole contract, it is equally clear that the answer in regard to safely keeping the books was intended as a warranty. It is not descriptive of anything, and related, not to matters depending upon opinion or judgment, as in Lynchburg Fire Ins. Co. v. West, 76 Va. 575, 44 Am. Rep. 177, and National Bank v. Insurance Co., 95 U. S. 673, 24 L. Ed. 563, in which cases the assured was asked as to the value of the property, but it constituted an undertaking to do a certain thing in the future, and is, therefore, not within the operation of the provision in the policy just quoted. To call such a stipulation a representation, or anything less than a warranty, is a misuse of terms.

This being so, the only remaining question necessary to be considered arises on a bill of exceptions taken by the plaintiff, defendant in error here. At the trial the plaintiff offered, but was not allowed, to testify that the application, which he admits he signed, was filled up by the agents of the company; that he was not questioned as to his books, and did not tell the agent he would keep them in an iron safe or secure in another building; that, being a foreigner, he could not read the English language; and that the questions and answers were not read to him.

We are of opinion that in this particular the circuit court ruled rightly. There is no pretense of fraud, and to have admitted the evidence would have been an infringement of the rule which excludes parol contemporaneous evidence to contradict or vary the terms of a valid written contract. This, according to Southern Mut. Ins. Co. v. Yates, 28 Grat. 585, is so clear that we need only refer to that case. There the insured, in answer to a question, stated that the premises were unincumbered, whereas they were in fact subject to a deed of trust. He was allowed, however, to testify at the trial that he had never read the application, and was not interrogated by the agent of the company as to incumbrances. But on appeal, this court, in an able opinion by Judge Staples, in which the authorities were reviewed, held the evidence inadmissible. The plaintiff, it was said, was bound

not only to answer the questions put to him correctly, but to use due diligence to see that the answers were correctly written, and that if he signed the application without reading it, or having it read to him, that of itself was inexcusable negligence. It was also said that if the evidence were admissible, it would be difficult to imagine a case in which the legal import of a deed might not be varied by parol testimony.

The only difference between that case and this is, that here the plaintiff offered to prove his inability to read the language in which the application was filled up. But that is immaterial, for he could have easily ascertained the contents of the paper, and the law presumes, under the circumstances of the present case, that when he signed the paper he understood and assented to all it contained. If the rule were otherwise, there would be no certainty or safety in written contracts. [24]

For the errors, however, in regard to the instructions the judgment must be reversed, and the case remanded for a new trial in conformity with this opinion.

Judgment reversed.

WESTERN ASSUR. CO. v. REDDING.

(Circuit Court of Appeals of the United States, Fifth Circuit, 1895. 68 Fed. 708, 15 C. C. A. 619.)

Action by Joseph H. Redding against the Western Assurance Company on a policy of insurance. Judgment was rendered for the plaintiff in the circuit court. Defendant brings error. The principal assignments of error were the trial court's refusal to charge the jury that under the evidence in the case there had been a breach of the "iron-safe clause," quoted in the opinion, and the contract thus avoided, and charging, in effect, that only substantial compliance with such clause was required. Affirmed.

McCormick, Circuit Judge.[25] Joseph H. Redding, the defendant in error, "kept store" in a country station town in Florida. He commenced the business January 2, 1893. He testifies that he took an inventory of his stock in February, 1893, but that inventory was destroyed when the store was burned. On the 10th day of February, 1893, he insured with the plaintiff in error, the Western Assurance Company, organized under the laws of Toronto, Canada, his stock of

[24] In the case of Sikes v. Life Ins. Co., 144 N. C. 626, 57 S. E. 391 (1907), an illiterate plaintiff was allowed to introduce evidence that he had been misled by the representations of the agent as to the nature and terms of the policy, and so recovered for premiums paid. In Cathcart v. Life Ins. Co., 144 N. C. 623, 57 S. E. 390 (1907), the plaintiffs, being perfectly able to read the policies for themselves, were not justified in relying on alleged misrepresentations of the agent, and there was no recovery.

[25] Part of the opinion is omitted.

goods and other property, taking $1,000 on the stock of goods. On the morning of the 1st of October, 1893, a fire occurred, which consumed his store and the stock of goods insured.

His policy contained the clause which is known as the "iron-safe clause," and is in these words: "It is a part of the conditions of this policy that the insured shall keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, and take an itemized inventory of stock on hand at least once every year; and it is further agreed that insured will keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in this policy is not actually open for business, or in some secure place, not exposed to fire which would destroy the house where said business is carried on. It is further agreed that, in event of loss, insured will produce said books and inventory. Failure to comply with these conditions shall render this policy null and void, and no suit or action at law shall be maintained thereunder for any loss." [26]

Payment of the loss was refused and recovery resisted on the ground that the insured had not kept the set of books contemplated by that clause, and that one of the books he claims to have kept was left out of the safe, and was consumed by the fire.[27] * * *

Viewed as "a set of books," from the standpoint of an expert in that scientific system of bookkeeping which obtains in the business of an insurance company which has pushed its business at least from the

[26] Iron-Safe Clause.—It is generally held that this clause is a reasonable condition, inserted in order that the extent of loss may be ascertained accurately. Georgia Home Insurance Co. v. Allen, 128 Ala. 451, 30 South. 537 (1901); Niagara Fire Ins. Co. v. Forehand, 169 Ill. 626, 48 N. E. 830 (1897); Sowers v. Mutual Fire Ins. Co., 113 Iowa, 551, 85 N. W. 763 (1901). The weight of authority is that the "iron-safe clause" is a promissory warranty. Southern Ins. Co. v. Parker, 61 Ark. 207, 32 S. W. 507 (1895); Hanover Fire Ins. Co. v. Dole, 20 Ind. App. 333, 50 N. E. 772 (1898); Connecticut Fire Ins. Co. v. Jeary, 60 Neb. 338, 83 N. W. 78, 51 L. R. A. 695 (1900); Ætna Ins. Co. v. Fitze, 34 Tex. Civ. App. 214, 78 S. W. 370 (1904). The Kentucky courts have, however, declined to consider the clause a warranty. Phœnix Ins. Co. v. Angel, 38 S. W. 1067, 18 Ky. Law Rep. 1034 (1897). The court says: "But we are of the opinion that a failure to comply with such a provision, although in the policy, would not work a forfeiture thereof. It is without consideration. It does not decrease the risk, and at most would only tend to the better preservation of the evidence to show the amount of the loss sustained in case of fire. It does not seem to us that it is competent to contract with the assured for the preservation of testimony in behalf of either party."

For a collection of cases upon this much-litigated clause, see 2 Cooley, Briefs on Insurance, 1813.

[27] The court here summarizes the evidence, which showed that the store was burned on the 1st of October, 1893; that an inventory had been completed September 16th, showing stock of the value of $4,906; that the books of the store consisted of a series of six, which were produced, and a daily cash-sales book containing the entry of the daily cash sales from the time of the inventory to that of the fire. This had inadvertently not been placed in the safe and was destroyed by the fire. The previous cash books showed that the cash sales were inconsiderable in amount, averaging less than $1 a day.

chief city of Canada to the obscure hamlet of Greenville, Fla., these books in evidence are primitive to a degree that may test his temper, if not his skill; but to impartial jurors, patiently searching for proof to support a recovery on a contract of indemnity for a loss insured against, and incurred without fraud or fault on the part of the insured, these books tell a plainer story than the expert unconsciously or strenuously looking to them for ground of forfeiture was able to read in them. He could make nothing out of their entries to show that the insured had on hand in his store, at the time of the fire, goods to such an amount in value that three-fourths thereof exceeded the amount of insurance written thereon, or to show that the insured had any goods in the store at the time of the fire. To our view, the very imperfections of these books vouch their good faith.

It is insisted that the accounts of goods purchased should have set out the specific articles, and the value of each, and that the account of cash sales should have been equally particular as to articles sold, and the price; for, it is argued, the insured may have sold goods at one-tenth of their cost price, for aught that appears in these entries of cash sales. If these accounts were to have been thus kept, thus itemized, why not have said so? There was time and space in the clause in question to provide expressly that the inventory of stock to be taken at least once every year "should be itemized." If the accounts of purchases and sales were to be so itemized, why take stock at all? The credit sales are itemized, as is not only customary, but necessary. Now, when the articles purchased, the goods sold on credit, and those sold for cash, are all itemized, posted, footed up, and balanced, barring moths, rust, and thieves, the difference would show the goods remaining; and the time spent, and shop wear of the stock, would either be wholly unnecessary, or, in the average country store, an expensive and worthless check on unscientific bookkeeping. When the circumstances of these respective parties are impartially considered, it is highly improbable that such a degree of extravagance or of proficiency in bookkeeping on the part of the insured was in the contemplation of either of them, and certainly was beyond the conception of the insured, and cannot be considered to have been in the mind of the agent of the insurer, without a high impeachment of his integrity, for he must have known that such a set of books as the contention now made by his company requires would not be kept.

It is well known that our law of insurance had its beginnings in marine risks. Parties willing and offering to indemnify against such risks for a consideration did not, and perhaps yet do not, by their agents, compass sea and land to find a subject; but those with ships or goods at hazard, either in person or by a broker, who is in fact the agent of the applicant, seek the protection they need by bringing their subjects to the attention of those whose business it is to furnish such insurance. These applicants gave what are called instructions for writing the policy, which, besides naming the ship, her

burden, cargo, and voyage, embraced such other matters as were supposed to constitute inducements to the contract, or to affect the rate of premium. These instructions were either oral or written, or partly oral and partly written. But in the earlier years of Lord Mansfield's service on the bench it was not the usage to consider the instructions as a part of the policy. Parol instructions were not entered in a book, nor written instructions kept, till, on the occasion of actions brought before him where brokers had made false representations in many matters material to the risk, that judge advised the insured to bring actions against the brokers, which some did, and recovered; and the brokers thereafter, on his lordship's caution and recommendation, began the practice of entering all representations made by them in a book.

Even at that early day there was no distinction better known than that which exists between a warranty or condition which makes part of a written policy, and a representation of the state of the case. Where it is a part of the policy it must be performed, is the doctrine of all the cases. Good faith is a necessary element of all binding contracts. And where insurance is effected as marine insurance formerly was, and generally is still written, the situation of the parties requires the exercise of the utmost good faith. In enforcing this requirement against unfaithful parties, rules were announced and followed which conditions then existing demanded, but, by reason of the gradual and great development of a change in the relations of parties to these contracts, these rules, though once wholesome and necessary, have become severe, and, with the well-known tendency towards the growing weight of precedents, have often been applied to cases and in a manner not within Lord Mansfield's reasonings. He says, with his peculiar force, "a warranty in a policy of insurance is a condition or a contingency, and unless that be performed there is no contract." De Hahn v. Hartley, 1 Term R. 343. In the case just cited there was written on the margin of the policy, "Sailed from Liverpool with 14 six pounders, swivels, small arms, and fifty hands or upwards." The ship sailed from Liverpool 13th October, 1778, with only 46 hands, but six hours after sailing she touched at Beaumaris, and took on 6 more hands, continuing her voyage with a force of 52 men, which she kept and had till her capture, 14th March, 1779, six months after sailing from Liverpool. The insurer, in ignorance of the facts, had paid the loss, but recovered it back, because there was no contract. Now if, instead of sailing from Liverpool with only 46 hands, the Juno had sailed with 52 hands, and on the 13th of March, 1779, the day before her capture, 6 of her men had seized one of her life boats and deserted, so that when she was attacked by the public enemy she had only 46 hands with which to repel force by force, does any one suppose that Lord Mansfield, or any other sane judge, would have held that by reason of that fact alone there was no contract at the time when the capture and loss occurred?

Out of the business of marine insurance, or superinduced thereby, the business of fire and life insurance has sprung, and grown till it fills all the land, and its cases overflow the courts and their reports. The relations of the parties are reversed. The policies in current use are travesties on the common-sense form in use in marine insurance. And while the distinctions and construction announced in Pawson v. Watson, Cowp. 785, and in De Hahn v. Hartley, supra, are too well settled to be disturbed by judicial action, there has long been a marked and growing judicial sense that the application of these, and later cases in line with them, should not be carried beyond the boundaries of controlling precedents; that common honesty and common sense are safe guides in the construction of even these wonderfully devised contracts. While, therefore, it is certainly the law that a precedent condition warranted to exist must in fact exist, exactly as stated, or there will be no contract, because the minds meet only on all the stipulated conditions, a promissory warranty is often, if not always, necessarily a condition subsequent, and courts should and do and will apply to these the doctrines that obtain in adjudging forfeitures.[28]

[28] Temporary Breach of Continuing Warranty.—The reluctance of the American courts to enforce the strict doctrine of forfeiture for breach of warranty is illustrated by those cases, which hold that, where there has been a temporary breach of a continuing warranty, not acted upon by the insurer, and in no wise contributing to the loss, the policy is merely suspended during the period of the violation, and automatically revived upon the discontinuance thereof. See Sumter Tobacco Warehouse Co. v. Phœnix Ins. Co. (1907) 76 S. C. 76, 56 S. E. 654, 10 L. R. A. (N. S.) 736, 121 Am. St. Rep. 941, 11 Ann. Cas. 780 (temporary increase of hazard not contributing to loss); Schmidt v. Peoria Marine & Fire Ins. Co. (1866) 41 Ill. 295 (same); Traders' Ins. Co. v. Catlin (1896) 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595 (temporary change in use of building); Born v. Home Ins. Co. (1900) 110 Iowa, 379, 81 N. W. 676, 80 Am. St. Rep. 300 (mortgage of premises made in violation of policy but paid before occurrence of loss); Hinckley v. Germania Fire Ins. Co. (1885) 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445 (temporary illegal use); McClure v. Mutual Fire Ins. Co. (1913) 242 Pa. 59, 88 Atl. 921, 48 L. R. A. (N. S.) 1221 (temporary presence on premises of prohibited articles).

The weight of authority, however, seems to be that by the violation of the warranty the policy is ipso facto annulled, and not merely suspended. See Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231 (1894); Georgia Home Ins. Co. v. Rosenfield, 95 Fed. 358, 37 C. C. A. 96 (1899); Kyte v. Assurance Co., 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508 (1889); Jones & Pickett v. Michigan Marine & Fire Co., 132 La. 847, 61 South. 846 (1913).

In Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co., 59 Wash. 501, 110 Pac. 36, 140 Am. St. Rep. 863 (1910), the policy in suit contained the following provision: "Warranted by the assured that due diligence be used that the automatic sprinkler system shall at all times be maintained in good working order." The defendant contended that the fact that the sprinkler system was for a considerable period out of order constituted a breach of warranty that absolutely avoided the policy, even though it was again in good working order at the time of the fire. The court held that in the first place the provision quoted above was not a warranty at all, since there was no express stipulation for forfeiture in case of breach, and, secondly, that, even if it were a warranty, a mere temporary breach, not in any wise contributing to the loss, merely suspended the operation of the policy, and did not absolutely avoid it. Dunbar, J., who wrote the opinion for the majority of the court, thus expresses his feeling about the strict rule as to warran-

It would too greatly extend this opinion to review the cases. Many of them are cited and epitomized in the third edition of May on Insurance, in the chapters on Warranties, Representations, and Exceptions. We think the application to the case at bar of what we have here advanced is apparent. The judgment of the circuit court is affirmed.[29]

ties: "It is unquestionably true, however, that there are cases, though not by any means a majority of the hundreds of cases that have been decided upon this question, that hold to the strict rule contended for; but in grateful contrast to those courts which adopt the rule of strict construction by, it seems to us, making a fetich of words, expressions, and definitions, and attributing potent magic to the word 'warranty,' or words of similar import, comes like a refreshing breeze from the sea of judicial enlightenment, the voice of the Supreme Court of Kentucky, in Germania Ins. Co. of New York v. Rudwig, 80 Ky. 223 (1882) where the rule is condemned. In the course of the opinion it was said: 'There is no doubt that an insurance company relies upon the truth of the representations made in either case, and equally certain that, if untrue and material to the risk, no inquiry will be directed for the purpose of determining whether the statement was fraudulently or innocently made. The injury to the insurer is the same, but when no injury can possibly result to the company, where is the breach and what is the penalty? It would certainly be no breach of warranty in a chattel if the quality was better than that warranted, unless the inferior article alone would conform to the wants of the purchaser; and if a breach, the damages would be merely nominal; but in regard to insurance contracts, that it neither increased nor diminished the risk, and it could not have influenced the action of either party in making the contract, is seized upon as a ground for forfeiting the entire policy and depriving the assured not only of the benefits of the contract, but permits the insurer to retain all the premiums paid. * * * Such contracts are to be interpreted like other agreements, and must be governed by the same rules, good faith being especially required, as one of the parties is necessarily less acquainted with the details of the subject than the other.'"

In a similar action on an identical policy issued by another insurance company brought in the Circuit Court of the United States for the Northern Division of the Western District of Washington, the court, at the close of the plaintiff's evidence, directed a verdict for the defendants. This judgment was reversed, on appeal to the Circuit Court of Appeals, Ninth Circuit, on the ground that the question whether there had been a breach of warranty should have been submitted to the jury. Port Blakely Milling Co. v. Royal Ins. Co., 186 Fed. 716, 108 C. C. A. 586 (1911).

[29] The vigorous dissenting opinion of Pardee, Circuit Judge, is omitted. In his dissent he relied principally upon Dwight v. Insurance Co., 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729 (1886); Imperial Fire Ins. Co. v. Coos County, 150 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231 (1893); Pawson v. Watson, 2 Cowp. 785 (1778), ante, p. 318; De Hahn v. Hartley, 1 T. R. 343 (1786), ante, p. 383, and May, Ins. (3d Ed.) § 156. From Imperial Fire Ins. Co. v. Coos County, supra, he quotes the following part of Justice Jackson's opinion: "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other; and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation, on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the

SECTION 3.—LIFE INSURANCE

ROSS v. BRADSHAW.

(Nisi Prius, 1761. Park, Ins. [3d Ed.] 438.)

In an action on a policy made on the life of Sir James Ross for one year from October, 1759, to October, 1760, warranted in good health at the time of making the policy, the fact was, that Sir James had received a wound at the battle of La Feldt in the year 1747, in his loins, which had occasioned a partial relaxation or palsy, so that he could not retain his urine or feces, and which was not mentioned to the insurer. Sir James died of a malignant fever within the time of the insurance. All the physicians and surgeons, who were examined for the plaintiff, swore, that the wound had no sort of connection with the fever; that the want of retention was not a disorder which shortened life, but he might, notwithstanding that, have lived to the common age of man: and the surgeons who opened him, said, that his intestines were all sound. There was one physician examined for the defendant, who said, the want of retention was paralytic; but being asked to explain, he said, it was only a local palsy, arising from the wound, but did not affect life: but, on the whole, he did not look upon him as a good life.

Lord MANSFIELD. The question of fraud cannot exist in this case. When a man makes insurance upon a life generally, without any representation of the state of the life insured, the insurers take all the risk, unless there was some fraud in the person insuring, either by his suppressing some circumstances which he knew, or by alleging what was false. But if the person insuring knew no more than the insurer, the latter takes the risk. In this case there is a warranty, and wherever that is the case, it must, at all events, be proved, that the party was a good life, which makes the question on a warranty much larger than that on fraud. Here it is proved that there was no representation at all as to the state of life, nor any question asked about it; nor was it necessary. Where an insurance is upon a representation, every material circumstance should be mentioned, such as age, way of life,

assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated, or failed to perform, the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

&c. But where there is a warranty, then nothing need be told; but it must in general be proved, if litigated, that the life was, in fact, a good one, and so it may be, though he have a particular infirmity. The only question is, whether he was in a reasonable good state of health, and such a life as ought to be insured on common terms. The jury, upon this direction, without going out of court, found a verdict for the plaintiff.[30]

WILLIS v. POOLE.

(Nisi Prius, 1780. Park, Ins. [3d Ed.] 439.)

It was an action on a policy on the life of Sir Simeon Stuart, Bart., from the 1st of April, 1779, to the 1st of April, 1780, and during the life of Eliza Edgley Ewer. This policy contained a warranty that Sir Simeon was about 57 years of age, and in good health on the 11th of May, 1779, and that Mrs. Ewer was about 78 years of age. The defendant, at the trial, admitted that Sir Simeon and Mrs. Ewer were of the respective ages mentioned in the warranty; that he died before the 1st of April, 1780, and that she was living.

Two questions were intended to have been made: (1) As to the plaintiff's interest: (2) on the warranty of health. The former was disposed of, by the plaintiff having proved a judgment debt. As to the latter, it appeared in evidence, that, although Sir Simeon was troubled with spasms and cramps from violent fits of the gout, he was in as good health, when the policy was underwritten, as he had been for a long time before. It was also proved by the broker, who effected the policy, that the underwriters were told, that Sir Simeon was subject to the gout. Dr. Heberden, and other gentlemen of the faculty, were examined, who proved that spasms and convulsions were symptoms incident to the gout.

Lord MANSFIELD. The imperfection of language is such, that we have not words for every different idea; and the real intention of parties must be found out by the subject-matter. By the present policy, the life is warranted to some of the underwriters, in health, to others in good health; and yet there was no difference intended in point of fact. Such a warranty can never mean that a man has not the seeds of a disorder. We are all born with the seeds of mortality in us. A man, subject to the gout, is a life capable of being insured, if he has no sickness at the time to make it an unequal contract.

There was a verdict for the plaintiff.

[30] As to the effect of a stipulation in a life insurance policy that it shall not become binding unless delivered to the insured while in good health, see extensive note in 17 L. R. A. (N. S.) appended to the report of Roe v. National Life Ins. Co., 137 Iowa, 696, 115 N. W. 500 (1908).

JEFFRIES v. LIFE INS. CO.

(Supreme Court of the United States, 1874. 22 Wall. 47, 22 L. Ed. 833.)

Error to the Circuit Court for the Eastern District of Missouri.

Jeffries, administrator of Kennedy, sued the Economical Life Insurance Company, of Providence, Rhode Island, in the court below, alleging that on the 19th of October, 1870, the said company issued a policy of insurance upon the life of the deceased for $5000; that Kennedy died in August, 1871, and that notice had been given to the company of his death, payment of the amount of insurance demanded and refused.

The policy, which the declaration set out at length, contained the clauses following, viz.:

"This policy is issued by the company, and accepted by the insured and the holder thereof, on the following express conditions and agreements, which are part of this contract of insurance:

"1st. That the statements and declarations made in the application for this policy, and on the faith of which it is issued, are in all respects true, and without the suppression of any fact relating to the health or circumstances of the insured, affecting the interests of said company.

"6th. That in case of the violation of the foregoing conditions, or any of them, * * * this policy shall become null and void."

The defendant's plea, setting up in defense of the action certain false statements, did not aver that these false statements were material to the risk. A demurrer to this plea was overruled, and judgment entered for the defendant.[31]

Mr. Justice HUNT delivered the opinion of the court:

The contention in opposition to the judgment is this: that the plea does not aver that the false statements made by the assured were material to the risk assumed. Is that averment necessary to make the plea a good one?

It is contended, also, that the false answers in the present case were not to the injury of the company, that they presented the applicant's case in a less favorable light to himself than if he had answered truly. Thus, to the inquiry are you married or single, when he falsely answered that he was single, he made himself a less eligible candidate for insurances than if he had truly stated that he was a married man; that although he deceived the company, and caused it to enter into a contract that it did not intend to make, it was deceived to its advantage, and made a more favorable bargain than was supposed.

This is bad morality and bad law. No one may do evil that good may come. No man is justified in the utterance of a falsehood. It is an equal offence in morals, whether committed for his own benefit or that of another. The fallacy of this position as a legal proposition,

[31] The statement of facts is abbreviated.

will appear in what we shall presently say of the contract made between the parties.

We are to observe, first, the averment of the plea: That Kennedy, in and by his application for the policy of insurance, in answer to a question asked of him by the company, whether he was "married or single?" made the false statement that he was "single," knowing it to be untrue; that in reply to a further question therein asked of him by the company, whether "any application had been made to any other company? If so, when?" answered "No;" whereas, in fact, at the time of making such false statement, he well knew that he had previously made application for such insurance, and been insured in the sum of $10,000 by another company.

We are to observe, secondly, the averment that the statements and declarations made in the application for said policy, and on the faith of which it is issued, are in all respects true, and without the suppression of any fact relating to the health or circumstances of the insured affecting the interests of the company.

We are to observe, also, that other clause of the policy, in which it is declared that this policy is made by the company and accepted by the insured, upon the express condition and agreement that such statements and declarations are in all respects true. This applies to all and to each one of such statements. In other words, if the statements are not true, it is agreed that no policy is made by the company, and no policy is accepted by the insured.

The proposition at the foundation of this point is this, that the statements and declarations made in the policy shall be true.

This stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material, but as to all statements. The statements need not come up to the degree of warranties. They need not be representations even, if this term conveys an idea of an affirmation having any technical character. Statements and declarations is the expression; what the applicant states and what the applicant declares. Nothing can be more simple. If he makes any statement in the application it must be true. If he makes any declaration in the application it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company.

There is no place for the argument either that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it.

It is the distinct agreement of the parties, that the company shall not be deceived to its injury or to its benefit. The right of an individual or a corporation to make an unwise bargain is as complete as that to make a wise bargain. The right to make contracts carries with it the right to determine what is prudent and wise, what is unwise and imprudent, and upon that point the judgment of the individual is subject to that of no other tribunal.

The case in hand affords a good illustration of this principle. The company deems it wise and prudent that the applicant should inform them truly whether he has made any other application to have his life insured. So material does it deem this information, that it stipulates that its liability shall depend upon the truth of the answer. The same is true of its inquiry whether the party is married or single. The company fixes this estimate of its importance. The applicant agrees that it is thus important by accepting this test. It would be a violation of the legal rights of the company to take from it its acknowledged power, thus to make its opinion the standard of what is material, and to leave that point to the determination of a jury.

The jury may say, as the counsel here argues, that it is immaterial whether the applicant answers truly if he answers one way, viz., that he is single, or that he has not made an application for insurance. Whether a question is material depends upon the question itself. The information received may be immaterial. But if under any circumstances it can produce a reply which will influence the action of the company, the question cannot be deemed immaterial. Insurance companies sometimes insist that individuals largely insured upon their lives, who are embarrassed in their affairs, resort to self-destruction, being willing to end a wretched existence if they can thereby bestow comfort upon their families. The juror would be likely to repudiate such a theory, on the ground that nothing can compensate a man for the loss of his life. The juror may be right and the company may be wrong. But the company has expressly provided that their judgment, and not the judgment of the juror shall govern. Their right thus to contract, and the duty of the court to give effect to such contracts, cannot be denied.

Of the authorities in support of these views, a few only will be mentioned. In Anderson v. Fitzgerald [4 House of Lords Cases, 483, 487], Fitzgerald applied to an insurance office to effect a policy on his life. He received a form of proposal containing questions required to be answered. Among them were the following: "Did any of the party's near relatives die of consumption or any other pulmonary complaint?" and "Has the party's life been accepted or refused at any office?" To each of these questions the applicant answered "No." The answers were false. F. signed the proposal and a declaration accompanying, by which he agreed "that the particulars above mentioned should form the basis of the contract." The policy mentioned several things, which were warranted by F., among which these two answers were not included. The policy also contained this proviso: that "if anything so warranted shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or any false statement made to the company in or about the obtaining or effecting of this insurance," the policy should be void.

On the trial before Mr. Justice Ball, he charged the jury "that they

must not only be satisfied that the various false statements were false in fact, and were made in and about effecting the policy, but also that such false statements were material to the insurance." A bill of exceptions was tendered, on the ground that the jury should have been directed "that if the statements were made in and about effecting the insurance and such statements were false in fact, the defendants were entitled to a verdict, whether such statements were or were not material." The exceptions were argued in the Court of Exchequer, where judgment was ordered for the plaintiff on the verdict. A writ of error was brought in the Court of Exchequer Chamber, where the judgment was affirmed by a majority of seven to three. The writ of error to the House of Lords was then brought. Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Justice Erle, Mr. Justice Creswell, Mr. Baron Platt, Mr. Justice Talfourd, Mr. Justice Williams, Mr. Baron Martin, and Mr. Justice Crompton attended.

Opinions were delivered by Mr. Baron Parke, the Lord Chancellor, Lord Brougham, and Lord St. Leonards, all concurring in reversing the judgment, on the ground that the question of the materiality of the statements should not have been submitted to the jury. This case was decided upon facts almost identical with the one before us, and presented the precise question we are considering. The counsel for the defendants asked for a ruling, that if the statements were untrue, the defendants were entitled to a verdict, whether they were or were not material. This was refused, and the judge charged that to entitle the defendants to a verdict, the statements must not only be false, bu material to the insurance. This was held to be error, and the judgment was reversed.

Cazenove v. British Equitable Assurance Company [6 C. B. N. S. 437, 141 Eng. Reprint, 527 (1859)] is a familiar case, and was decided in the same way. This case was affirmed in the Exchequer Chamber, in 1860 [29 L. J. C. P. 160].

Many cases may be found which hold, that where false answers are made to inquiries which do not relate to the risk, the policy is not necessarily avoided unless they influenced the mind of the company, and that whether they are material is for the determination of the jury. But we know of no respectable authority which so holds, where it is expressly covenanted as a condition of liability that the statements and declarations made in the application are true, and when the truth of such statements forms the basis of the contract.

The counsel for the insured insists that policies of insurance are hedged about with so many qualifications and conditions that questions are propounded with so much ingenuity and in such detail, that they operate as a snare, and that justice is sacrificed to forms. We are not called upon to deny this statement. The present, however, is not such a case. The want of honesty was on the part of the applicant. The attempt was to deceive the company. It is a case, so far as we

can discover, in which law and justice point to the same result, to wit, the exemption of the company.

Judgment affirmed.[32]

Justices CLIFFORD and MILLER dissenting.[33]

[32] See, also, Price v. Phœnix Ins. Co., 17 Minn. 497 (Gil. 473), 10 Am. Rep. 166 (1871), and Kansas City Life Ins. Co. v. Blackstone (Tex. Civ. App.) 143 S. W. 702 (1912). In the latter case, in reply to a question of the application, the insured stated both his place of birth and his place of residence to be Big Sandy, Upshur county, Tex. The exact fact was that he was born and resided at a point in Upshur county about seven miles north of Big Sandy. In reply to another question he stated that he was not then and had never been "engaged in or connected with the manufacture or sale of malt or spirituous liquors." The fact was that, six or eight years previously, when he was a boy 15 or 16 years of age, the applicant had worked as a hand about a still situated on his father's place, owned by his father and uncles, which during about 10 years had been operated by them in the manufacture of spirituous liquors. One of the questions propounded in part 2 of the application called upon the decedent to give his "full family history as accurately as possible." In reply to the question the insured stated that he then had three brothers and two sisters living, and a brother, but no sister, dead. The fact was that his father had been married three times, and that the decedent then had two brothers of the whole and five brothers of the half blood living, and a brother of the whole blood dead, and that he had two sisters of the whole blood living and one sister of the half blood dead. The Court of Civil Appeals, reversing the judgment for the plaintiff in the lower court, held that each answer above mentioned was such a breach of warranty as to avoid the policy, following Insurance Co. v. Pinson, 94 Tex. 554, 63 S. W. 531 (1901), and Hutchinson v. Insurance Co. (Tex. Civ. App.) 39 S. W. 325 (1897). On motion for rehearing, the court commented as follows: "The conclusion reached by this court that the testimony showed a breach by the insured of the warranties set up by the plaintiff in error as a reason why a recovery on the policies should be denied is assailed as unreasonable. We do not think so. It was reached in deference to the rule we understand to be established in this state that, without reference to their materiality, such warranties in such a contract, if not literally, must be substantially, true, otherwise the contract cannot be enforced by the party intended to be indemnified by it. We agree that the rule is unreasonable when applied to the facts of such cases as the Hutchinson and Pinson Cases, cited in the opinion, and when applied to the facts of this case. If we were authorized to do so, we would not hesitate to so change it as to require in cases like those and this one, conclusions radically different from those reached. But, so long as the rule remains unchanged, we cannot do otherwise than enforce it."

[33] The decision in this case caused the enactment in 1874 of a statute abolishing the strict rule as to warranties in life insurance. See Rev. St. Mo. 1899, § 7890.

ÆTNA LIFE INS. CO. v. FRANCE.

(Supreme Court of the United States, 1876. 94 U. S. 561, 24 L. Ed. 287.)

Mr. Justice BRADLEY. * * *[34] Second. The other exceptions relate to alleged misrepresentations by Chew in the proposal for insurance. The policy makes the proposal and the answers to the questions therein a part of the contract, and declares that if they shall be found in any respect false or fraudulent, the policy itself shall be void. Among the questions are the following, with the answers given to each respectively:

"'4. Place and date of birth of the party whose life is to be insured?' Ans. 'Born in New Jersey, in 1835.'

"'5. Age and next birthday?' Ans. 'Thirty years, Oct. 28, as near as I can recollect.'

"'11. Has the party ever had any of the following diseases; if so, how long, and to what extent: palsy, spitting of blood, consumption, asthma, bronchitis, diseases of the lungs, * * * rupture, convulsions, etc.?' Ans. 'None.'

"'12. Is the party subject to habitual cough, dyspepsia, etc.?' Ans. 'No.'

"'13. Has the party had, during the last seven years, any severe disease? If so, state the particulars, and the name of the attending physician.' Ans. 'No.'"

The answers were followed by this qualification: "The above is as near correct as I remember."

The defendant offered evidence tending to show that Chew, at the time of the application, would have been thirty-five or thirty-seven years old at his next birthday, instead of thirty, and that he was born Oct. 28, 1828; and that he had been ruptured from infancy, and so continued up to the date of the application, and wore a truss; and that he had had consumption, or some disease of the lungs; and that he was subject to habitual cough and dyspepsia; and had been attended by physicians for severe disease within seven years; and that he knew all of these matters at the time of the application. Counter evidence was given on the part of the plaintiffs.

Among the proofs of death was an affidavit of the widow of Chew, stating that he was born Oct. 28, 1828, which defendant relied on as to the point of age. Mrs. France denied all knowledge of the papers received by defendant as proof of loss, except her own affidavit; and as to the alleged rupture, called, amongst others, Dr. Lewis, as an expert, and proposed to him the question, whether the existence of a reducible rupture in a subject of life assurance in his opinion appreciably increased the risk of the underwriters? The question was objected to, but allowed.

[34] A portion of the opinion, dealing with a question of insurable interest, is omitted.

The defendant asked the court to charge, that if any of the answers were untrue, in whole or in part, the verdict must be for the defendant. The court charged that the truth or falsehood of the answers materially affected the risk; but added: "But the answers here are qualified by the words appended at the foot of the application, 'the above is as near correct as I remember,' which are applicable to all the statements made by the assured. He must be understood, therefore, as stipulating only for the integrity and approximate accuracy of his answers, and not for their absolute verity. Without this qualification, substantial error in any of his answers would avoid the policy, irrespective of his motive, because he warranted their truth; with it, the plaintiffs' right to recover will not be defeated, unless it appears that some one of the answers was consciously incorrect. To avoid the policy, then, the jury must be satisfied that the answers, or some of them, were untrue in any respect materially affecting the risk, and that the assured knew of their incorrectness."

And, in particular, as to Chew's representation of his age, the court charged, "that if he knew, or had reason to believe, that the year of his birth, as stated in the answer, did not correctly indicate his age, the policy is void, and the plaintiffs are not entitled to recover."

We think the qualification made by the court was entirely justified by the form in which the answers were given. If the company was not satisfied with the qualified answer of the applicant, they should have rejected his application. Having accepted it, they were bound by it.

As to the diseases inquired about, the court charged substantially to the same effect; namely, that the answers called for were material, and if untrue, and Chew knew or had reason to believe them so, the policy was void. As to the alleged rupture, in particular, the court said: "If, however, it appears that the rupture had been completely reduced, so that its effects had entirely passed away, and it had ceased to affect his health or impair his capacity to take fatiguing and prolonged exercise, the jury will determine whether the answer is untrue as nearly as he could remember. On the other hand, if the rupture had not been cured, it is hardly presumable that he could have forgotten it at the time of the application; and if the jury so find, it was his duty to disclose the fact that he had been afflicted with this disease, and his negative answer will avoid the policy."

And so of the rest. We think the charge was a fair one, and gave the defendant the full benefit of any falsity contained in the answers given by the applicant. Under the charge as given, we do not see how the evidence of the physician, even if irrelevant, could injure the defendant.

Other points were raised, but it is unnecessary to discuss them. From a careful examination of the whole case, as presented, we are satisfied that there is no error in the record.

Judgment affirmed.[35]

MOULOR v. AMERICAN LIFE INS. CO.

(Supreme Court of the United States, 1884. 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447.)

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This is an action upon a policy of insurance issued by the American Life Insurance Company of Philadelphia. By its terms the amount insured—$10,000—is payable to Emilie Moulor, the plaintiff in error, her executors, administrators, and assigns, within 60 days after due notice and satisfactory proof of interest and of the death of her husband, the insured, certain indebtedness to the company being first deducted. Upon the first trial there was a verdict for the plaintiff, which was set aside and a new trial awarded. At the next trial the jury were peremptorily instructed to find for the company, and judgment was accordingly entered in its behalf. Upon writ of error to this court that judgment was reversed upon the ground that, as to certain issues arising out of the evidence, the case should have been submitted to the jury. Moulor v. Ins. Co., 101 U. S. 708, 25 L. Ed. 1077. At the last trial there was a verdict and judgment for the defendant. This writ of error is sued out to review the proceedings and judgment at that trial. The alleged errors and the facts relating to them fully appear in the opinion of the court.

Mr. Justice HARLAN delivered the opinion of the court:[36] * * *

The seventh question in the application for insurance required the insured to answer yes or no, as to whether he had ever been afflicted with any of the following diseases: Insanity, gout, rheumatism, palsy, scrofula, convulsions, dropsy, small-pox, yellow-fever, fistula, rupture, asthma, spitting of blood, consumption, and diseases of the lungs, throat, heart, and urinary organs. As to each the answer of the insured was, no.

The tenth question was: "Has the party's father, mother, brothers, or sisters been afflicted with consumption or any other serious family

[35] In a former appeal of this same case, reported in 91 U. S. 510, 23 L. Ed. 401 (1875), the qualification placed by the insured upon his answers seems to have been wholly overlooked. Upon that appeal the judgment of the lower court in favor of the plaintiff was reversed, on the ground that the statements alleged to be false were warranties, and their materiality erroneously left to the jury.

As to the effect of qualified warranties, see notes, 53 L. R. A. 201; 43 L. R. A. (N. S.) 431.

[36] A part of the opinion determining certain questions of practice is omitted.

disease, such as scrofula, insanity, etc.?" The answer was, "No, not since childhood."

The fourteenth question was: "Is there any circumstance which renders an insurance on his life more than usually hazardous, such as place of residence, occupation, physical condition, family history, hereditary predispositions, constitutional infirmity, or other known cause, or any other circumstance or information with which the company ought to be made acquainted?" The answer was, no.

To the sixteenth question, "Has the applicant reviewed the answers to the foregoing questions, and is it clearly understood and agreed that any untrue or fraudulent answers, or any suppression of facts in regard to health, habits, or circumstances, or neglect to pay the premium on or before the time it becomes due, will, according to the terms of the policy, vitiate the same and forfeit all payments made thereon?" the answer was, yes.

At the close of the series of questions, 19 in number, propounded to and answered by the applicant, are the following paragraphs:

"It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and it is acknowledged and agreed by the undersigned that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentation or concealment of facts, then any policy granted upon this application shall be null and void, and all payments made thereon shall be forfeited to the company.

"And it is further agreed that if at any time hereafter the company shall discover that any of said answers or statements are untrue or evasive, or that there has been any concealment of facts, then, and in every such case, the company may refuse to receive further premiums on any policy so granted upon this application, and said policy shall be null and void, and payments forfeited as aforesaid."

The policy recites that the agreement of the company to pay the sum specified is "in consideration of the representations made to them in the application," and of the payment of the premium at the time specified; further, "it is hereby declared and agreed that if the representations and answers made to this company, on the application for this policy, upon the full faith of which it is issued, shall be found to be untrue in any respect, or that there has been any concealment of facts, then and in every such case the policy shall be null and void."

The main defense was that the insured had been afflicted with scrofula, asthma, and consumption prior to the making of his application, and that, in view of his statement that he had never been so afflicted, the policy was, by its terms, null and void. There was, undoubtedly, evidence tending to show that the insured had been afflicted with those diseases, or some of them, prior to his application; but there was also evidence tending to show not only that he was then in sound health, but that, at the time of his application, he did not know or

believe that he had ever been afflicted with any of them in a sensible, appreciable form.

Referring to the seventh question in the application, the court—after observing that the answer thereto was untrue, and the policy avoided, if the insured had been, at any time, afflicted with either of the diseases last referred to—instructed the jury: "It is of no consequence, in such case whether he knew it to be untrue or not; he bound himself for its correctness, and agreed that the validity of his policy should depend upon its being so." Again: "That he, the insured, did not know he was then afflicted, is of no importance whatever, except as it may bear upon the question, was he afflicted? If he was, his answer (for the truth of which he bound himself) was untrue, and his knowledge, or absence of knowledge, on the subject, is of no consequence." Further: "You [the jury] must determine whether the insured was at any time afflicted with either of the diseases named. If he was, his answer, in this respect, was untrue, and, notwithstanding he may have ignorantly and honestly made it, the policy is void, and no recovery can be had upon it." To so much of the charge as we have quoted the plaintiff excepted.

Assuming—as in view of the finding of the jury we must assume—that the insured was, at the date of his application, or had been prior thereto, afflicted with the disease of scrofula, asthma, or consumption, the question arises whether the beneficiary may not recover, unless it appears that he had knowledge, or some reason to believe, when he applied for insurance, that he was or had been afflicted with either of those diseases. The circuit court plainly proceeded upon the ground that his knowledge or belief as to having been afflicted with the diseases specified, or of some one of them, was not an essential element in the contract; in other words, if the assured ever had, in fact, any one of the diseases mentioned in his answer to the seventh question, there could be no recovery, although the jury should find from the evidence that he acted in perfect good faith, and had no reason to suspect, much less to believe or know, that he had ever been so afflicted. If, upon a reasonable interpretation, such was the contract, the duty of the court is to enforce it according to its terms; for the law does not forbid parties to a contract for life insurance to stipulate that its validity shall depend upon conditions or contingencies such as the court below decided were embodied in the policy in suit.[37]

[37] WARRANTIES OF GOOD HEALTH.—By the great weight of authority, if a statement of the insured as to his health is warranted to be true in every respect, its incorrectness in fact will wholly avoid the policy, even though the insured acted in perfect good faith and had no means of knowing that he was diseased. See National Annuity Ass'n v. McCall, 103 Ark. 201, 146 S. W. 125, 48 L. R. A. (N. S.) 418 (1912); Woehrle v. Metropolitan Life Ins. Co., 21 Misc. Rep. 88, 46 N. Y. Supp. 862 (1897); Campbell v. Insurance Co., 98 Mass. 381 (1867); Supreme Lodge, K. & L. of H., v. Payne, 101 Tex. 449, 108 S. W. 1160, 15 L. R. A. (N. S.) 1277 (1908); McClain v. Provident Savings & Life Assur. Soc. (C. C.) 105 Fed. 834 (1901); Swick v. Insurance Co., 2 Dill. 160, Fed. Cas. No. 13,692 (1873). In Knights of Maccabees v. Shields,

The contracts involved in Jeffries v. Life Ins. Co., 22 Wall. 47, 22 L. Ed. 833, and Ætna Life Ins. Co. v. France, etc., 91 U. S. 510, 23 L. Ed. 401, were held to be of that kind. But, unless clearly demanded by the established rules governing the construction of written agreements, such an interpretation ought to be avoided. In the absence of explicit, unequivocal stipulations requiring such an interpretation, it should not be inferred that a person took a life policy with the distinct understanding that it should be void, and all premiums paid thereon forfeited, if at any time in the past, however remote, he was, whether conscious of the fact or not, afflicted with some one of the diseases mentioned in the question to which he was required to make a categorical answer. If those who organize and control life insurance companies wish to exact from the applicant, as a condition precedent to a valid contract, a guaranty against the existence of diseases, of the presence of which in his system he has and can have no knowledge, and which even skillful physicians are often unable,

157 Ky. 35, 162 S. W. 778, 49 L. R. A. (N. S.) 854 (1914), the court went so far as to hold that an innocent misstatement that the insured had never had diabetes avoided the policy, in spite of the statute (Ky. St. § 639), which provided that statements and descriptions in applications and policies should be considered representations and not warranties.

A few courts take the view that the insured warrants only his good faith in making the representation as to his health. See Grattan v. Insurance Co., 92 N. Y. 274, 44 Am. Rep. 372 (1883); Ames v. Insurance Co., 40 App. Div. 465, 58 N. Y. Supp. 244 (1899); Schwarzbach v. Protective Union, 25 W. Va. 622, 52 Am. Rep. 227 (1885). This view is vigorously expressed in the opinion of Ailshie, J., in Rasicot v. Royal Neighbors of America, 18 Idaho, 95, 108 Pac. 1048, 29 L. R. A. (N. S.) 433, 138 Am. St. Rep. 180 (1910), as follows:

"At the outset it must be conceded that, under the terms of this contract, the answers given by the applicant for insurance are viewed by the law in the nature of warranties rather than as mere representations. * * * It has been found as a fact that the insured was pregnant at the time she made application for insurance, and at the time the benefit certificate was issued to her. It is also established that she did not know of her pregnancy at the time, and that her answer was in good faith and honestly made. Viewing these facts alone, if we should follow the inflexible technical rule of warranties which has been adopted by many courts, the inquiry would end here, and we would hold that the breach itself avoided the contract, and that the subsequent conduct of the society could not be considered. Joyce on Insurance, § 1970; McDermott v. Modern Woodmen of America, 97 Mo. App. 636, 71 S. W. 833 (1903); Hoover v. Royal Neighbors of America, 65 Kan. 616, 70 Pac. 595 (1902); Beard v. Royal Neighbors of America, 53 Or. 102, 99 Pac. 83, 19 L. R. A. (N. S.) 798, 17 Ann. Cas. 1199 (1909). * * *

"The state is vitally interested in the thrift and frugality of its citizens, and in encouraging the citizen in providing for his family and looking to their protection and comfort in the event of his demise. To allow him when acting honestly and from the most laudable motive to be led on under the belief that he is devoting his savings to the purchase of a legacy for his dependent ones, and then, when the beneficiary comes to make demand for that paltry recompense, to tell him that the courts, the final arbiters of his rights, will not listen to the equity of the case, would be doing violence to the principles of fair dealing, and would be likewise contrary to the best interests of the public at large, which we term 'public policy.' Had the insured been in any manner advised that her policy was not in force, she would perhaps have procured one that would have been valid, and this would have been to the benefit of her family and in the interest of society as well, and the state it-

after the most careful examination, to detect, the terms of the contract to that effect must be so clear as to exclude any other conclusion.[38] * * *

We have seen that the application contains a stipulation that it shall form a part of the contract of insurance; also, that the policy purports to have been issued upon the faith of the representations and answers in that application. Both instruments, therefore, may be examined to ascertain whether the contract furnishes a uniform, fixed rule of interpretation, and what was the intention of the parties. Taken together, it cannot be said that they have been so framed as to leave no room for construction. The mind does not rest firmly in the conviction that the parties stipulated for the literal truth of every statement made by the insured.

self must feel an interest in having her take such precautions, and in that sense the construction of such contracts becomes a matter of public policy. The insurer cannot suffer half so much from such a policy and such a construction as the individuals interested, and society at large must in the end of necessity suffer from the cold-blooded, technical rule that seems to prevail in so many jurisdictions. This ought to be the rule in order to prevent organizations soliciting membership, receiving insurance applications, and accepting dues and assessments for years, and then, after the applicant is perhaps too old to procure insurance elsewhere, tell the insured that he made a false answer in some one of the numerous questions propounded by the society, and that consequently his policy has never been in force. Such a contract is clearly violative of the interests of society at large and of the welfare of its citizens, and ought to be discouraged. The more than 200 questions contained in one application blank run the gamut of the applicant's ancestry from his grand ancestors down to date, and ask him about every disease and pathological condition for which the medical world has been able to invent a name, and then, if forsooth he misses a guess on any one of them, he is chargeable with expert knowledge and warranting the correctness of his answers, and must lose his protection on the venture of a guess. In such a game the insured has only a chance in hundreds, and the result must follow that he only thinks he is insured. It amounts to mental insurance and nothing more. The insurance society in such case could exist for the sole and only purpose of collecting dues and assessments with no insurance liability.

"Some courts have held, and we think the rule sound, that, notwithstanding the stipulation of warranty in such contracts, answers which merely express the opinion or judgment of the applicant cannot be classed among the facts, the truth of which is insured by the applicant—that he only warrants his honesty and good faith as to such answers. Rupert v. Supreme Court U. O. F., 94 Minn. 293, 102 N. W. 715 (1905); Ranta v. Supreme Tent of Maccabees, 97 Minn. 454, 107 N. W. 156 (1906); Royal Neighbors of America v. Wallace, 73 Neb. 409, 102 N. W. 1020 (1905); Royal Neighbors of America v. Wallace, 5 Neb. (Unof.) 519, 99 N. W. 256 (1904). * * * This rule seems to us more in consonance with reason and justice than the rule of strict literal warranty contended for by appellant."

It is everywhere held that a statement as to bodily health, warranted to be true to the best of the insured's knowledge and belief, warrants only his good faith. See Lakka v. Modern Brotherhood (Iowa) 143 N. W. 513, 49 L. R. A. (N. S.) 902 (1913); Ætna Life Ins. Co. v. France, 94 U. S. 561, 24 L. Ed. 287 (1876), ante, p. 423; Smith v. Prudential Ins. Co., 83 N. J. Law, 719, 85 Atl. 190, 43 L. R. A. (N. S.) 431 (1912).

[38] Here the court comments upon Nat. Bank v. Insurance Co., 95 U. S. 673, 24 L. Ed. 563, ante, p. 402 (1877), and Grace v. American Ins. Co., 109 U. S. 282, 3 Sup. Ct. 207, 27 L. Ed. 932 (1883), and quotes from the opinion in the former case.

There is, to say the least, ground for serious doubt as to whether the company intended to require, and the insured intended to promise, an exact, literal fulfillment of all the declarations embodied in the application. It is true that the word "warranted" is in the application; and, although a contract might be so framed as to impose upon the insured the obligations of a strict warranty, without introducing into it that particular word, yet it is a fact, not without some significance, that that word was not carried forward into the policy, the the terms of which control, when there is a conflict between its provisions and those of the application. The policy upon its face characterizes the statements of the insured as representations. Thus, we have one part of the contract apparently stipulating for a warranty, while another part describes the statements of the assured as representations. The doubt, as to the intention of the parties, must, according to the settled doctrines of the law of insurance, recognized in all the adjudged cases, be resolved against the party whose language it becomes necessary to interpret. The construction must, therefore, prevail which protects the insured against the obligations arising from a strict warranty.

But it is contended that if the answers of the assured are to be deemed representations only, the policy was, nevertheless, forfeited, if those representations were untrue in respect of any matters material to the risk. The argument is that if the insured was, at the time of his application, or had been at any former period of his life, seriously or in an appreciable sense, afflicted with scrofula, asthma, or consumption, his answer, without qualification, that he had never been so afflicted, being untrue, avoided the policy, without reference to any knowledge or belief he had upon the subject. The soundness of this proposition could not be disputed if, as assumed, the knowledge or good faith of the insured, as to the existence of such diseases, was, under the terms of the contract in suit, of no consequence whatever in determining the liability of the company. But is that assumption authorized by a proper interpretation of the two instruments constituting the contract? We think not.

Looking into the application, upon the faith of which the policy was issued and accepted, we find much justifying the conclusion that the company did not require the insured to do more, when applying for insurance, than observe the utmost good faith, and deal fairly and honestly with it, in respect of all material facts about which inquiry is made, and as to which he has or should be presumed to have knowledge or information. The applicant was required to answer yes or no as to whether he had been afflicted with certain diseases. In respect of some of those diseases, particularly consumption, and diseases of the lungs, heart, and other internal organs, common experience informs us that an individual may have them in active form, without, at the time, being conscious of the fact, and beyond the power of any one, however learned or skillful, to discover. Did the company expect,

when requiring categorical answers as to the existence of diseases of that character, that the applicant should answer with absolute certainty about matters of which certainty could not possibly be predicated? Did it intend to put upon him the responsibility of knowing that which, perhaps, no one, however thoroughly trained in the study of human diseases, could possibly ascertain? We shall be aided in the solution of these inquiries by an examination of other questions propounded to the applicant. In that way we may ascertain what was in the minds of the parties.

Beyond doubt the phrase "other known cause," in the fourteenth question, serves the double purpose of interpreting and qualifying all that precedes it in the same clause or sentence. For instance, the applicant was not required to state all the circumstances within his recollection of his family history, but those only which rendered the proposed insurance more than usually hazardous, and of which he had personal knowledge or of which he had information fairly justifying a belief of their existence. If he omitted to state circumstances in his "family history" of which he had no knowledge, nor any information deserving attention, that omission would not avoid the policy, although it subsequently appeared that those circumstances, if known to the company, would have shown that the proposed insurance was more than usually hazardous.

Apart from other questions or clauses in the application, the tenth question would indicate that an incorrect or untrue answer as to whether the applicant's "father, mother, brothers, or sisters had been affected with consumption, or any other serious family disease, such as scrofula, insanity, etc.," would absolve the company from all liability. Yet, in the fourteenth question, the insured, being asked as to his family history and as to "hereditary predispositions,"—an inquiry substantially covering some of the specific matters referred to in the tenth question,—was, as we have seen, only required to state such circumstances as were known to him, or of which he had information, and which rendered an insurance upon his life more than usually hazardous.

So, in reference to that part of the fourteenth question relating to the then physical condition of the applicant. Suppose at the time of his application he had a disease of the lungs or heart, but was entirely unaware that he was so affected. In such a case he would have met all the requirements of that particular question, and acted in the utmost good faith, by answering no, thereby implying that he was aware of no circumstance in his then physical condition which rendered an insurance upon his life more than usually hazardous. And yet, according to the contention of the company, if he had, at any former period of his life, been afflicted with a disease of the heart or lungs, his positive answer to the seventh question, that he had not been so afflicted, was fatal to the contract; this, although the applicant had no

knowledge or information of the existence at any time of such a disease in his system.

So, also, in reference to the inquiry in the fourteenth question as to any "constitutional infirmity" of the insured. If, in answering that question, he was required to disclose only such constitutional infirmities as were then known to him, or which he had reason to believe then existed, it would be unreasonable to infer that he was expected, in answer to a prior question, in the same policy, to guaranty absolutely, and as a condition precedent to any binding contract, that he had never, at any time, been afflicted with diseases of which, perhaps, he never had and could not have any knowledge whatever.

The entire argument in behalf of the company proceeds upon a too literal interpretation of those clauses in the policy and application which declare the contract null and void if the answers of the insured to the questions propounded to him were, in any respect, untrue. What was meant by "true" and "untrue" answers? In one sense, that only is true which is conformable to the actual state of things. In that sense, a statement is untrue which does not express things exactly as they are. But in another and broader sense the word "true" is often used as a synonym of honest, sincere, not fraudulent. Looking at all the clauses of the application, in connection with the policy, it is reasonably clear—certainly the contrary cannot be confidently asserted—that what the company required of the applicant, as a condition precedent to any binding contract, was, that he would observe the utmost good faith towards it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation, or concealment of facts with which the company ought to be made acquainted; and that by so doing, and only by so doing, would he be deemed to have made "fair and true answers."

If it be said that an individual could not be afflicted with the diseases specified in the application, without being cognizant of the fact, the answer is that the jury would, in that case, have no serious difficulty in finding that he had failed to communicate to the company what he knew or should have known was material to the risk, and that, consequently, for the want of "fair and true answers," the policy was, by its terms, null and void. But, whether a disease is of such a character that its existence must have been known to the individual afflicted with it, and therefore whether an answer denying its existence was or not a fair and true answer, is a matter which should have been submitted to the jury. It was an erroneous construction of the contract to hold, as the court below did, that the company was relieved from liability if it appeared that the insured was, in fact, afflicted with the diseases, or any of them, mentioned in the charge of the court. The jury should have been instructed, so far as the matters here under examination are concerned, that the plaintiff was not precluded from recovering on the policy, unless it appeared from all the circumstances, including the nature of the diseases with which the insured was al-

leged to have been afflicted, that he knew, or had reason to believe, at the time of his application, that he was or had been so afflicted.

It results from what has been said that the judgment must be reversed with directions to set aside the verdict, and for further proceedings consistent with this opinion. It is so ordered.[39]

[39] The tendency in the more recent cases is to give very little effect to the term "warrant" or "warranty" in determining the real character of statements inducing the issue of policies. See note in 11 L. R. A. (N. S.) 981, attached to the report of Reppond v. National Life Ins. Co., 100 Tex. 519, 101 S. W. 786, 11 L. R. A. (N. S.) 981, 15 Ann. Cas. 618 (1907). The same tendency is noticeable in the English cases.

"Insurers are thus in the highly favorable position that they are entitled not only to bona fides on the part of the applicant, but also to full disclosure of all knowledge possessed by the applicant that is material to the risk. And in my opinion they would have been wise if they had contented themselves with this. Unfortunately the desire to make themselves doubly secure has made them depart widely from this position by requiring the assured to agree that the accuracy, as well as the bona fides, of his answers to various questions put to him by them or on their behalf shall be a condition of the validity of the policy. This might be reasonable in some matters, such as the age and parentage of the applicant, or information as to his family history, which he must know as facts. Or it might be justifiable to stipulate that these conditions should obtain for a reasonable time—say during two years—during which period the company might verify the accuracy of the statements which by hypothesis have been made bona fide by the applicant. But insurance companies have pushed the practice far beyond these limits, and have made the correctness of statements of matters wholly beyond his knowledge, and which can at best be only statements of opinion or belief, conditions of the validity of the policy. For instance, one of the commonest of such questions is, 'Have you any disease?' Not even the most skilled doctor, after the most prolonged scientific examination, could answer such a question with certainty, and a layman can only give his honest opinion on it. But the policies issued by many companies are framed so as to be invalid unless this and many other like questions are correctly—not merely truthfully—answered, though the insurers are well aware that it is impossible for any one to arrive at anything more certain than an opinion about them. I wish I could adequately warn the public against such practices on the part of insurance offices. I am satisfied that few of those who insure have any idea how completely they leave themselves in the hands of the insurers, should the latter wish to dispute the policy when it falls in. In the case of the question to which I have referred, if it can be shown, even by the aid of the contemporaneous examination of the medical referee of the office itself, that the insured had at the time some disease, the policy is void. The disease may have been unknown, and even undiscoverable; it may have been transient, and have had no effect on his future life, or on the cause of his death. These things are immaterial. If the company choose to dispute the policy, and establish a single inaccuracy in these statements, which are thus made conditions, the policy is void, and usually all that has been paid thereon is forfeit. * * * Under these circumstances it is plainly the duty of the court to require the insurers to establish clearly that the insured consented to the accuracy, and not the truthfulness, of his statements being made a condition of the validity of the policy. No ambiguous language suffices for this purpose. The applicant can be and is called on to answer all questions relevant to the matter in hand. But this is merely the fulfillment of a duty—it is not contractual. To make the accuracy of these answers a condition of the contract is a contractual act, and, if there is the slightest doubt that the insurers have failed to make clear to the man on whom they have exercised their right of requiring full information that he is consenting thus to contract, we ought to refuse to regard the correctness of the answers given as being a condition of the validity of the policy. In other words, the

SECTION 4.—WARRANTY AS AFFECTED BY STATUTE

FIDELITY MUT. LIFE ASS'N OF PHILADELPHIA v. FICKLIN et al.

(Court of Appeals of Maryland, 1891. 74 Md. 172, 21 Atl. 680, 23 Atl. 197.)

Action on a policy of insurance issued May 13, 1887, in the city of Baltimore upon the life of Thos. D. Ficklin, by the defendant association, incorporated under the laws of Pennsylvania. The provisions of the policy made all the statements in the application unequivocally warranties. Ficklin died March 2, 1888. The statute of Pennsylvania referred to in the opinion of the court was pleaded and proved.

Among other grounds of defense, the defendant claimed that the policy was avoided in accordance with its terms by the falseness of certain statements made in the application. The court left it to the jury to decide on all the evidence whether the answers alleged to be false were made in good faith, and whether they were material to the risk. The verdict was for the plaintiff, and from judgment entered thereon defendant appealed.[40]

BRYAN, J. * * * According to the terms of the policy, the assured warrants every answer contained in his application "to be full, complete, and true." By the ordinary principles governing policies of insurance, this warranty would impose on the plaintiffs the onus of proving the literal truth of these answers. Insurance Co. v. Wise, 34 Md. 597. But the statute of Pennsylvania which was offered in evidence enacts that in such case no misrepresentation or untrue statement in the application, made in good faith by the applicant, shall effect a forfeiture or be a ground of defense, unless it relate to some matter material to the risk. It is beyond question that the powers and capacities of a Pennsylvania corporation are conferred and regulated by the law of that state. Without its authority it could not exist at all. Every contract it makes, every act it performs, every right it acquires, and every obligation it assumes must be by virtue of the same authority. It may make contracts, transact business, sue and be sued, beyond the limits of the state of its origin. But all these transactions are by the permission of the state where they occur, and not by virtue of any right belonging to the corporation. Everywhere, within and with-

insurers must prove by clear and express language the animus contrahendi on the part of the applicant; it will not be inferred from the fact that questions were answered, and that the party interrogated declared that his answers were true. This is only what a witness does when he declares he has given true evidence. He is stating his belief, and not making a contract."—Fletcher Moulton, L. J., in Joel v. Law Union Ins. Co. [C. A., 1908] 2 K. B. 863, 885.

[40] The statement of facts is much abbreviated, and a part of the opinion, not relating to warranties, is omitted.

out the state which created it, its contracts are limited, construed, and sustained according to its character and the laws which affect its operation. In McKim v. Glenn, 66 Md. 484, 8 Atl. 130, this court said: "It is a familiar principle that a corporation, and all who deal with it, are bound by the law of its creation, and all such laws as may be legitimately prescribed for its government by the sovereign authority from which it derives its corporate existence."

It appears to us, therefore, that the inquiry in reference to the answers in the application for insurance ought to be not only whether they were true, but also whether they were made in good faith, and whether they related to some matter material to the risk. The warranty made every statement in the application so vitally material to the validity of the contract that it imposed on the assured the necessity of proving that they were all literally true. The statute made a great change in this respect. It introduced two new questions for determination before the contract could be declared invalid, viz., the good faith of the applicant in making his statements, and the materiality to the risk of the matters involved in them. Before the statute there could be no inquiry with reference to the risk; every statement was material, and if untrue in any respect, however, irrelevant to the risk, the policy was invalidated.

[The court here gives a summary of the evidence relating to the alleged misstatements concluding as follows:]

Upon the whole evidence on this point, it would have been competent for the jury to decide whether the answers in the application were made in good faith, and whether they were material to the risk.

Some of the prayers offered in behalf of the defendant maintained that the suit could not be brought in this state, some that certain answers made in the application were untrue, and that therefore the plaintiffs could not recover; but they did not submit to the jury the questions of good faith and materiality to the risk. Some sought to leave to the jury questions of fact arising on the "proofs of death;" some maintained that the proof of death was not sufficient, because it did not show a just claim; others sought to withdraw from the jury the question of materiality to the risk, insisting that, as matter of law, certain answers in the application were material to the risk; others maintained that the Pennsylvania statute had no application to the case; and one sought to exclude from the jury that portion of the evidence of Dr. Atkinson which tended to show that Ficklin did not read or know of the contents of some portion of the application. All of these prayers were rejected by the court. What we have said will show that we approve of this ruling. The prayers granted in behalf of the plaintiffs are in accordance with the views which we have expressed. Judgment affirmed.

[On motion for rehearing May 5, 1891.]

Bryan, J. The learned counsel for the appellant have moved for a reargument in this case. They base their motion on the supposition

that the court overlooked or disregarded certain clauses in the application for insurance. These clauses were quoted word for word in the statement prepared by the court, which preceded the opinion, and which set forth the facts on which it was founded. The Pennsylvania statute enacted that, "whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application made in good faith by the applicant shall effect a forfeiture, * * * unless such misrepresentation or untrue statement relate to some matter material to the risk." This is a most clear declaration that under the circumstances mentioned the policy shall not be forfeited; in other words, that it shall be a valid and binding contract. It is part of the nature and essence of the warranty that it should have the effect stated. It is a condition on which it is permitted to have existence and operation; as much so as if it had been written in express words on the face of the policy. The contract of insurance must be made in subordination to the statute, and must have the legal effect which the statute attributes to it, and none other. Whatever form of words may be used, the legal effect of the warranty must be such as the statute impresses upon it. It was the intention of the legislature to prevent insurance companies from forfeiting policies by means of warranties, as they had been previously construed, and to enforce the new construction set forth in the statute. These corporations, manifestly, have not the legal capacity to make a contract which should give a construction to a warranty in opposition to that which the law has established; and, of course, they cannot, by virtue of any agreement, acquire the competency to do what the law forbids.

It is stated in the policy that the application for insurance is made a part of the contract, and that the assured agrees that every statement and answer contained therein is material, and warrants them "to be full, complete, and true." And in the application the applicant declares and agrees that every statement and answer are material to the risk, and he warrants them all. He also states as follows: "I also agree that if any of the answers or statements made and contained herein, * * * whether made in good faith or otherwise, are in any respect untrue, then said policy and this contract shall be null and void, notwithstanding any statute or law to the contrary." In other words, the statute is to be entirely overthrown and set aside, and the insurance company under the guise of an agreement, is to acquire the power to accomplish the very result which the statute intended to prevent. Statutes would be very ineffective if they could be defeated in this way. If an untrue statement material to the risk is warranted, the policy is void; but the invalidity of the policy depends upon the fact whether the statement is material to the risk. The materiality of the statement is the indispensable condition on which the invalidity of the policy depends, and it must be established by proof. It is not competent to substitute for this proof an agreement of the parties

that it should be considered material. Neither can an agreement be valid which gives an effect to a warranty, which is in defiance of the statute. The legislature enacted a rule for the regulation of the contracts of insurance companies, which is a matter of public interest and concern.[41] The operation of this rule does not depend on the agreement of these corporations to adopt it as a basis of their contracts; on the contrary, the rule prescribes the scope and effect of policies of insurance, and authoritatively determines the duties and obligations which arise from them.

We have discovered no reason for another argument in this case. Motion overruled.

WHITE v. PROVIDENT SAV. LIFE ASSUR. SOC. OF NEW YORK.

(Supreme Judicial Court of Massachusetts, 1895. 163 Mass. 108, 39 N. E. 771, 27 L. R. A. 398.)

Action by Bridget L. White against the Provident Savings Life Assurance Society of New York on a policy of insurance. There was a verdict for defendant, and plaintiff excepts. Verdict set aside, and a new trial ordered.

BARKER, J. The most important question raised by the report is as to the effect of St. 1887, c. 214, § 21, now, by the Massachusetts insurance act of 1894, re-enacted as St. 1894, c. 522, § 21. The question is, in substance, whether the provisions of that section include in the word "misrepresentation" statements which in insurance law are classed as "warranties," because expressly said to be warranties by the language of the parties, or whether the section deals only with statements which are representations, and not with technical warranties. The ruling of the trial court went upon the theory that the section did not affect statements which were said in the policy and the application to be warranties, but only misrepresentations as to matters which were the subject of representations as distinguished from warranties. The section, as it stood in St. 1887, c. 214, § 21, was in these words: "No oral or written misrepresentation made in the negotiation of a contract or policy of insurance by the assured or in his behalf, shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss;" and the language of St. 1894, c. 522, § 21, is the same.

This language is broader than that of Pub. St. c. 119, § 181, which applied only to misrepresentations made in obtaining or securing

[41] That such statutes are constitutional, see Hancock Mut. Life Ins. Co. v. Warren, 181 U. S. 73, 21 Sup. Ct. 535, 45 L. Ed. 755 (1901); Scottish Union & Nat. Ins. Co. v. Wade (Tex. Civ. App.) 127 S. W. 1186 (1910).

policies of fire insurance and of life insurance, and which was in these words: "No oral or written misrepresentation made in obtaining or securing a policy of fire or life insurance shall be deemed material, or defeat or avoid the policy, or prevent its attaching unless such misrepresentation is made with actual intent to deceive or unless the matter misrepresented increases the risk of loss." The broader language of the section, as it is found in the general insurance act of 1887, was clearly designed to extend the rule, which up to that time dealt only with misrepresentations affecting policies of fire insurance and of life insurance, and to apply it to misrepresentations made in the negotiation of any contract or policy of insurance of whatever kind. Pub. St. c. 119, § 181, is merely a re-enactment identical in language with St. 1878, c. 157, § 1, which as to life insurance was a wholly new provision.[42] * * *

It is easy to see how an insurer by multiplying immaterial statements to be made by the insured, and giving to them, by the wording of the policy, the technical character of warranties, can, in the absence of any statute provision upon the subject, place the assured in a position in which it will be difficult, if not impossible, for him, although he has acted in good faith, to recover upon his contract, because of some inaccurate statement on his part. If he is held to have warranted the truth of a statement, its exact and literal truth is a necessary condition of his right to recover, however immaterial the statement may be, and however honest may have been his conduct. In the opinion of a majority of the court, it was the intention of the legislature by St. 1878, c. 157, to change this rule to some extent, and to enact in place of it one which should hold the contract valid unless the misstatement, if made in the negotiation of the contract, was made with an actual intent to deceive, or unless the misstatement was of a matter which actually increased the risk of loss; and this with reference to statements which may be said by the parties to be warranties as well as those which were only representations. Such was already the law as to statements not technical warranties. As to mere representations, the statute may well be held to be only declaratory, but as to warranties it made a new rule. In the opinion of a majority of the court, it speaks in terms neither of warranties nor of representations, technically so called, but deals with all misrepresentations made in negotiating the contract or policy. Misstatements of fact, whether the statement is said to be by the parties a warranty or a representation, are equally misrepresentations, and are placed in each case upon the same footing by the statute which applies to them if the statements are called "warranties" by the parties no

[42] A careful review of the earlier legislation relating to warranties and representations is here omitted, as well as a statement of the common law rule as to the same subjects. Brief comment on the evidence at the close of the opinion is also omitted.

less than if they are mere "representations." And the same construction must, in the opinion of a majority of the court, be given to Pub. St. c. 119, § 181, and to St. 1887, c. 214, § 21, which was in force when the policy sued on was written.

It is not necessary at present to consider whether the statute would have any effect if an immaterial statement declared by the application to be a warranty, instead of, as in the present case, being referred to in the policy, and thus brought into it by such reference only, were independently written out at length in the policy itself, and thus there declared to be a warranty upon the exact truth of which the policy was conditioned and founded. The statements upon the falsity of which the defendant relies in this case are not incorporated into the policy except by reference to the application. The declaration of the applicant warranting the answers to be true was in his application made in the negotiation of his policy, and was within the operation of the statute. In the opinion of a majority of the court, it was not taken out of the operation of the statute by the reference to the application in the policy, that it was "in consideration of the stipulations and agreements in the application herefor, and upon the next page of this policy, all of which are a part of this contract." In the trial of the present case a different view of the effect of the statute was held by the presiding judge, who ruled that, because the statements of the assured were warranties, the provisions of St. 1887, c. 214, § 21, did not apply. The plaintiff's exception to this ruling was well taken, and because the ruling was wrong the verdict for the defendant must be set aside, and a new trial ordered. * * *

So ordered.[43]

[43] It was held in the case of Victoria S. S. Co. v. Western Assur. Co. (Cal.) 139 Pac. 807 (1914), that under sections 2608, 2610, 2611, of the California Civil Code a breach of even an express warranty, would not avoid the policy unless it was material. The effect of most of these statutes is to render all statements upon which a contract of insurance is based subject to the common-law rule as to representations. This is well stated in Hermany v. Association, 151 Pa. 17, 24 Atl. 1064 (1892), as follows: "This act has effected a change in life insurance contracts, and a very wise and wholesome change it is. It provides against the effect which formerly attached to warranties as to many frivolous and unimportant matters contained in the questions and answers set forth in the applications, which often were of no consequence as to the risk involved, but which the courts were obliged to uphold simply because they were warranties. This class of merely technical objections to recovery is now swept away. Ordinarily questions of good faith and materiality are for the jury, and, where the materiality of a statement to the risk involved is itself of a doubtful character, its determination should be submitted to the jury. But it was never intended by" this act, nor does it "assume to change the law in cases where the matter stated was palpably and manifestly material to the risk, or where it was absolutely and visibly false in fact." See, also, Price v. Standard Life Ins. Co., 90 Minn. 264, 95 N. W. 1118 (1903).

But many of these statutory provisions go far beyond transforming warranties into representations, as is apparent from the following extract taken from the opinion of Weaver, J., in Ley v. Metropolitan Life Ins. Co., 120 Iowa, 203, 210, 94 N. W. 568 (1903): "We have in this state a statute which

JOHNSON v. NATIONAL LIFE INS. CO.

(Supreme Court of Minnesota, 1913. 123 Minn. 453, 144 N. W. 218.)

Action by Mary Johnson against the National Life Insurance Company. Verdict for plaintiff. From denial of an alternative motion for judgment or new trial, defendant appeals. Reversed.

DIBELL, C. This action is brought to recover upon a policy of life insurance issued to the plaintiff's son. The plaintiff is the beneficiary and the verdict was in her favor. The defendant appeals from an order denying its alternative motion for judgment or for a new trial.

The defendant claims that the policy was avoided, as a matter of law, by a misrepresentation to the effect that the deceased had never consulted a physician; that the court erred in leaving to the jury the question whether certain misrepresentations were material and whether they increased the risk of loss and whether they were made with intent to deceive and defraud; and that it erred in leaving to the jury the question whether the deceased made a certain misrepresentation.

1. Section 5, c. 220, Laws 1907, par. 4, found in R. L. Supp. 1909, § 1695, subd. 6, par. 4, requires the standard life policy to contain, among other provisions, the following: "A provision that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and that no such statement shall avoid the policy unless it is contained in a written application and a

provides that the issuance of a certificate of health by the medical examiner estops the company from alleging or proving that the insured person was not in the condition of health required by the policy at the time the insurance was effected, unless the same was procured by or through the fraud or deceit of the assured. Code, § 1812. This serves to exclude the technical defenses which were formerly available, based on the doctrine of warranties as to the health and history of the insured person. To escape liability because of the uninsurable condition of the applicant's health or medical history, the insurer is required to show that the policy or health certificate was procured by fraud." See, also, Empire Life Ins. Co. v. Gee, 171 Ala. 435, 55 South. 166 (1911); Mut. Life Ins. Co. v. Allen, 174 Ala. 511, 56 South. 568 (1911).

The Supreme Court of Georgia has determined that under the provisions of the Code of that state (Civ. Code 1910, §§ 2479–2483), the falsity of immaterial statements, though incorporated in the application and made a part of the policy, and therein declared to be warranties, does not avoid the policy. A misrepresentation is not to be considered material unless it affects "the nature, or extent, or character of the risk." Furthermore, this is so imperatively the law of the state that the parties cannot by contract make material matters that are really immaterial. Supreme Conclave v. Wood, 120 Ga. 328, 47 S. E. 940 (1904); German-American Life Ass'n v. Farley, 102 Ga. 720, 29 S. E. 615 (1897). See the discussion of these cases in Ætna Life Ins. Co. v. Moore, 231 U. S. 543, 554, 34 Sup. Ct. 186, 58 L. Ed. —— (1913).

For a collection of statutory provisions relating to the avoidance of insurance policies by breach of warranty or through misrepresentations, and of the cases construing them, see 2 Cooley, Briefs on Insurance, 1189–1195.

copy of such application shall be indorsed upon or attached to the policy when issued."

Section 20, c. 175, Laws 1895, now section 1623, R. L. 1905, is as follows: "No oral or written misrepresentation made by the assured, or in his behalf, in the negotiation of insurance, shall be deemed material, or defeat or avoid the policy, or prevent its attaching, unless made with intent to deceive and defraud, or unless the matter misrepresented increases the risk of loss." Before the revision section 1623 read "with actual intent to deceive and defraud."

The policy in suit is a standard life policy, of the statutory form, contains the provision required by the Laws of 1907, and a copy of the application is attached to the policy. The effect of the statutes cited is for determination.

A representation is a statement proffered as a basis for an insurance contract. A warranty is a statement or covenant of the contract. Representations must be substantially true. Warranties must be strictly or literally fulfilled.

Our statutes, and statutes like them, were intended to put warranties upon substantially the basis of representations, and to do away with defenses, made by incorporating conditions and terms in policies, making them by agreement material representations or warranties, and controlling on the right of recovery. As we construe the statute a material misrepresentation, made with intent to deceive and defraud, avoids the policy. A material misrepresentation, not made with intent to deceive or defraud, does not avoid the policy unless by the misrepresentation the risk of loss is increased. If a material misrepresentation increases the risk of loss, the policy is avoided, regardless of the intent with which it was made. An immaterial representation, though made with intent to deceive and defraud, does not avoid the policy.[44]

Several of the states have statutes of like purpose, and some are couched in language substantially identical. The cases construing such statutes uniformly hold that the last "or" in section 1623 is used in the alternative. We bow to the authority of the cases and adopt their construction. The following cases indicate the general purpose of such statutes and they are in general harmony with the construction which we adopt: Levie v. Met. Life Ins. Co., 163 Mass. 117, 39 N. E. 792; White v. Provident, etc., Soc., 163 Mass. 108, 39 N. E. 771, 27 L. R. A. 398; Rainger v. Boston Mut. Life Ass'n, 167 Mass. 109, 44 N. E. 1088; Dolan v. Mutual Reserve, etc., Ass'n, 173 Mass. 197, 53 N. E. 398; Empire Life Ins. Co. v. Gee, 171 Ala. 435, 55 South. 166; Id. (Ala. Sup.) 60 South. 90; Mutual Life Ins. Co. v. Allen, 174 Ala. 511, 56 South.

[44] See, in accord, Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45 (1890).

568; Hartford Life Ins. Co. v. Stallings, 110 Tenn. 1, 72 S. W. 960; Light v. Insurance Co., 105 Tenn. 480, 58 S. W. 851; Hermany v. Fidelity Mut. Life Ass'n, 151 Pa. 17, 24 Atl. 1064; Lutz v. Metropolitan Life Ins. Co., 186 Pa. 527, 40 Atl. 1104; Penn. Mut. Life Ins. Co. v. Mechanics' Sav. Bank, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70; Id., 73 Fed. 653, 19 C. C. A. 316, 38 L. R. A. 33, 70; Warren Deposit Bank v. Fidelity & Deposit Co., 116 Ky. 38, 74 S. W. 1111, 25 Ky. Law Rep. 289; Provident Sav. Soc. v. Whayne's Adm'r, 131 Ky. 84, 93 S. W. 1049, 29 Ky. Law Rep. 160; March v. Met. Life Ins. Co., 186 Pa. 629, 40 Atl. 1100, 65 Am. St. Rep. 887; Fidelity Mut. Life Ass'n v. Miller, 92 Fed. 63, 34 C. C. A. 211; Mut. Life Ins. Co. v. Robinson, 115 Md. 408, 80 Atl. 1085. The case of Price v. Standard Life & Acc. Co., 90 Minn. 264, 95 N. W. 1118, seems to be in accord.

Some of the cases cited seem to hold that a misrepresentation made with intent to deceive and defraud, though the matter misrepresented is immaterial in character, avoids the policy. We do not stop to inquire how many, if any, directly and necessarily so hold. We cannot adopt such a doctrine. Long prior to the statute this court held that a fraudulent misrepresentation of an immaterial matter did not avoid the policy; and the 1895 law was not intended to make the insurer's liability less.

2. Whether a misrepresentation is material, and whether the misrepresentation increases the risk of loss, and whether a misrepresentation is made with intent to deceive and defraud, are questions usually for the jury, with the burden of proof upon the insurer. They may be for the court. Levie v. Met. Life Ins. Co., 163 Mass. 117, 39 N. E. 792; Rainger v. Boston Mut. Life Ins. Co., 167 Mass. 109, 44 N. E. 1088; Mattson v. Modern Samaritans, 91 Minn. 434, 98 N. W. 330; Hermany v. Fidelity Mut. Life Ass'n, 151 Pa. 17, 24 Atl. 1064; Provident Sav. Ass'n v. Whayne's Adm'r, 131 Ky. 84, 93 S. W. 1049, 29 Ky. Law Rep. 160; Taylor v. Grand Lodge, 96 Minn. 441, 105 N. W. 408, 3 L. R. A. (N. S.) 114; O'Connor v. Modern Woodmen, 110 Minn. 18, 124 N. W. 454, 25 L. R. A. (N. S.) 1244.

The defendant claims that it appears from the evidence, so that it should be declared as a matter of law, that the insured, with intent to deceive and defraud, made material misrepresentations to the effect that he had never consulted a physician, that a change of climate had never been advised nor sought for his health, and that he was at the time in good health, and that as a matter of law these misrepresentations were material and increased the risk of loss.

It appears that four years before the application for insurance the insured consulted a physician. There was testimony, over the objection of the plaintiff, that the physician diagnosed the case as

one of incipient tuberculosis and advised the deceased that to effect a cure he must live in the open air and change his habits of living. He went to Montana and worked for a year in railway yards. He came back to his home and worked on the farm. He again went to Montana for a while, finally returning to the farm for a permanent stay. The testimony was ample that he appeared to be in good health and was doing the work of an ordinary man. The examining physician found nothing the matter with him when he made his examination. Some weeks before his death he caught cold through exposure at a farm party. There was testimony of his attending physician, received over objection, that he died of tuberculosis. There was testimony negativing the claim that he died of tuberculosis at all. The insured was a farm boy and was sought out by the agent of the company and solicited to purchase insurance.

The evidence just recited bears upon the materiality of the representations, the increase of risk, and the intent to deceive and defraud. There was error in receiving evidence of the physician as to the condition of the insured at the time he treated him some four years prior to his application. It is doubtful whether a foundation was laid for an objection to it. The effect and admissibility of the physician's statements in the proofs of loss should be considered from the standpoint of an admission of the beneficiary. Upon another trial these questions, as well as the questions arising upon the physician's direct testimony, as to the cause of the death of the deceased, will doubtless be properly determined. Upon the record before us we need express no opinion as to the merits of the case, though it may be said that, with all things conceded to the defendant, there is little evidence of an intent on the part of the insured to deceive or defraud.

3. The following question and answer appear in the application: "Q. When did you last consult a physician and for what? A. Never." It is conceded that four years prior the insured had consulted a physician for some ailment. The court left it to the jury to find whether this answer was made. In doing so it erred. Upon another trial there may be an issue for a jury upon this question There was none upon the trial had. There must be a new trial.

Order reversed.

STATUTORY PROVISIONS.—St. 6 Edw. VII, c. 41, §§ 33-35 (1906), the Marine Insurance Act:

33. (1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly

complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

34. (1) Noncompliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.

(2) Where a warranty is broken, the assured cannot avail himself of the defense that the breach has been remedied, and the warranty complied with, before loss.

(3) A breach of warranty may be waived by the insurer.

35. (1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

(2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

California Civil Code:

Sec. 2603. A warranty is either express or implied.

Sec. 2604. No particular form of words is necessary to create a warranty.

Sec. 2605. Every express warranty, made at or before the execution of a policy, must be contained in the policy itself, or in another instrument signed by the insured, and referred to in the policy, as making a part of it.

Sec. 2606. A warranty may relate to the past, the present, the future, or to any or all of these.

Sec. 2607. A statement in a policy, of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof.

Sec. 2608. A statement in a policy, which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty that such act or omission shall take place.

Sec. 2609. When before the time arrives for the performance of a warranty relating to the future, a loss insured against happens, or performance becomes unlawful at the place of contract, or impossible, the omission to fulfill the warranty does not avoid the policy.

Sec. 2610. The violation of a material warranty, or other material provision of a policy, on the part of either party thereto, entitles the other to rescind.

Sec. 2611. A policy may declare that a violation of specified provisions thereof shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy.

Sec. 2612. A breach of warranty, without fraud, merely exonerates an insurer from the time that it occurs, or where it is broken in its inception prevents the policy from attaching to the risk.

CHAPTER VII

IMPLIED CONDITIONS OF FORFEITURE

SECTION 1.—SEAWORTHINESS

DIXON v. SADLER.

(Court of Exchequer, 1839. 5 Mees. & W. 405.)

Assumpsit on a policy of insurance, dated 22d of January, 1838, on the ship John Cook, and cargo, at and from the 17th of January, 1838, until the 17th of July, 1838, at noon, in port and at sea, at all times and in all places, being for the space of six calendar months. The pleadings are sufficiently stated in the opinion. At the trial before Parke, B., it appeared that the vessel left Rotterdam for Sunderland properly ballasted and equipped on the 15th of May, and arrived on the 19th of May opposite a point called Seaham, which was about four miles from the port of Sunderland. On arriving there, and having a pilot on board, the master commenced heaving part of his ballast overboard, as was proved to be usual on such occasions. Whilst this was going on, the vessel drifted to the northward, and a strong squall coming on from the southeast, the ship was upset on her broadside, and her masts lay on the water. Every endeavour was made to right her, but in vain. She afterwards sunk off Ryhope, drifted on shore, and became a total wreck. If the crew had not removed the ballast, the ship would most likely have stood the squall. A verdict having been entered for the defendant on the issue as made in the pleadings, the court granted the plaintiff leave to move to enter a verdict.

Alexander having, in Easter Term last, obtained a rule to enter a verdict accordingly, or for judgment non obstante veredicto,

Creswell and S. Temple showed cause.

PARKE, B. In this case the defendant, to a declaration upon a time policy for six months, stating a loss by perils of the seas, pleaded three pleas, on each of which issue was joined. On the first and third, the verdict was found for the plaintiff; on the second, for the defendant. This plea stated, "that, though the vessel was lost by perils of the sea, yet that such loss was occasioned wholly by the wilful, wrongful, negligent, and improper conduct of the master and mariners of the ship, by wilfully, wrongfully, negligently, and improperly throwing overboard so much of the ballast, that the vessel became unseaworthy.

and was lost by perils of the sea, which otherwise she would have safely encountered and overcome." On a motion for judgment non obstante veredicto, it occurred to the Court to be questionable whether the plea was not at all events bad, inasmuch as the terms of it did not exclude the case of a loss by barratry, for which the underwriters would be clearly liable, and that on this declaration; and, as the fact certainly was, that the crew were not guilty of barratry, it was very properly agreed that the plea should be amended by inserting the words, "but not barratrously," after the words, "negligently and improperly." And the plea, therefore, in its present shape, raises the question, whether the underwriters are liable for the wilful but not barratrous act of the master and crew, in rendering the vessel unseaworthy before the end of the voyage, by casting overboard a part of the ballast. The case was very fully and ably argued, during the course of the last and present term, before my Brothers ALDERSON, GURNEY, MAULE, and myself. We have considered it, and are of opinion that the plea is bad in substance, and that the plaintiff is entitled to judgment, notwithstanding the verdict.

The question depends altogether upon the nature of the implied warranty as to seaworthiness, or mode of navigation, between the assured and the underwriter, on a time policy. In the case of an insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it.[1] If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk;[2] and, if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as, if it were a voyage down a canal or river, and thence across the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage; and their negligence or misconduct is no defence to an action on the policy, where the loss has

[1] To be seaworthy the vessel must be staunch and tight in hull, complete in rigging, machinery, and equipment, and properly manned, furnished, and provisioned. See The Orient (C. C.) 16 Fed. 916 (1883); Wedderburn v. Bell, 1 Camp. 1 (1807); Merchants' Insurance Co. v. Morrison, 62 Ill. 242, 14 Am. Rep. 93 (1871); Fontaine v. Insurance Co., 10 Johns. (N. Y.) 58 (1813); Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398 (1890), where policy was avoided because compass was defective at commencement of voyage, though fact was unknown to master. Furthermore, the cargo must be safely stowed and not greater than the safe carrying capacity of the ship. Chase v. Insurance Co., 5 Pick. (Mass.) 51 (1827); Cincinnati Mut. Ins. Co. v. May, 20 Ohio, 211 (1851).

[2] Annen v. Woodman, 3 Taunt. 299 (1810); Hibbert v. Martin, 1 Park, Ins. (6th Ed.) p. 299, note.

been immediately occasioned by the perils insured against. This principle is now clearly established by the cases of Busk v. Royal Exchange Company, 2 B. & Ald. 72; Walker v. Maitland, 5 B. & Ald. 171; Holdsworth v. Wise, 7 B. & Cr. 794; Bishop v. Pentland, Id. 219; and Shore v. Bentall, Id. 798, note, nor can any distinction be made between the omission by the master and crew to do an act which ought to be done, or the doing an act which ought not, in the course of the navigation. It matters not whether a fire which causes a loss be lighted improperly, or, after being properly lighted, be negligently attended; whether the loss of an anchor, which renders the vessel unseaworthy, be attributable to the omission to take proper care of it, or to the improper act of shipping it, or cutting it away; nor could it make any difference whether any other part of the equipment were lost by mere neglect, or thrown away or destroyed, in the exercise of an improper discretion, by those on board. If there be any fault in the crew, whether of omission or commission, the assured is not to be responsible for its consequences.

The only case which appears to be at variance with this principle is that of Law v. Hollingsworth, 6 Term R. 160, in which the fact of the pilot who had been taken on board for the navigation of the river Thames, having quitted the vessel before he ought, (under what circumstances is not distinctly stated,) appears to have been held to vitiate the insurance. In this respect, we cannot help thinking that the case, although attempts were made to distinguish it in some of the decided cases, must be considered as having been overruled by the modern authorities above referred to; and that the absence, from any cause to which the owner was not privy, of the master or any part of the crew, or of the pilot, who may be considered as a temporary master, after they had been on board, must be on the same footing as the absence, from a similar cause, of any part of the necessary stores or equipments originally put on board. The great principle established by the more recent decisions is, that, if the vessel, crew, and equipments be originally sufficient, the assured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew; and this principle prevents many nice and difficult inquiries, and causes a more complete indemnity to the assured, which is the object of the contract of insurance. If the case, then, were that of a policy for a particular voyage, there would be no question as to the insufficiency of the plea; and the only remaining point is, whether the circumstance of this being a time policy makes a difference. There are not any cases in which the obligation of the assured in such a case, as to the seaworthiness or navigation of the vessel, is settled; but it may be safely laid down, that it is not more extensive than in the case of an ordinary policy, and that, if there is no contract as to the conduct of the crew in the one case, there is none in the other. Here it is clear that no objection arises, on the ground of seaworthiness of the vessel, until that unsea-

worthiness was caused by the throwing overboard a part of the ballast, by the improper act of the master and crew; and, as the assured is not responsible for such improper act, we are of opinion that the plea is bad in substance, and the plaintiff entitled to our judgment.

Rule absolute to enter judgment for the plaintiff non obstante veredicto.

SECTION 2.—DEVIATION

BURGESS v. EQUITABLE MARINE INS. CO. OF PROVINCETOWN.

(Supreme Judicial Court of Massachusetts, 1878. 126 Mass. 70, 30 Am. Rep. 654.)

Action on a policy of insurance on the fishing vessel Christie Johnstone, the risk commencing on July 15, 1874. Trial before Gray, C. J., who reported the case for the consideration of the full court in substance as follows: * * *

The vessel sailed from Plymouth on June 13, 1874, on a cod-fishing voyage to the Banks, in a seaworthy condition, with four barrels of clam bait, which was the usual quantity of bait taken by vessels of her class on such a voyage. For several years past it has been the practice of such vessels not to take enough bait to last for the entire trip, but to rely principally on catching squid on the Banks, and to use them for bait; and for several years prior to 1874 squid have been plenty on the Banks, but in 1874 they were very scarce.

After fishing on the Banks for three weeks, and having exhausted nearly all his bait, the master of the vessel, solely for the purpose of procuring bait, went to St. Peter's, the nearest practical port where bait could be obtained, there procured bait, and then sailed from St. Peter's to the Banks, and resumed fishing. To reach the port of St. Peter's the vessel sailed about one hundred and ten miles from the fishing-ground. She left the fishing-ground on Thursday, reached St. Peter's on Saturday; and, having procured bait there, left St. Peter's on Tuesday following, and then sailed for another Bank, where she arrived and resumed her fishing on the next Thursday. On August 6, 1874, while so fishing on the Banks, the vessel encountered a severe gale, sprung a leak, and was totally lost, with all the property on board. * * *

The defendant consented to a verdict for the plaintiff, subject to the opinion of the full court upon the question, whether, as matter of law, there had been a deviation. If, in the opinion of the court, the going to St. Peter's for bait was a deviation which discharged the

insurer, the verdict was to be set aside, and judgment entered for the defendant; otherwise, judgment for the plaintiff on the verdict.[3]

ENDICOTT, J. By the terms of the policy the vessel was insured "at and from Plymouth to the Banks, cod-fishing, and at and thence back to Plymouth." This is a definite and distinct description of the contemplated voyage between two fixed termini. The Banks are named as the outward terminus, and while there engaged in cod-fishing, and until her return to Plymouth, the vessel was covered by the policy. The language used is not open to the construction that it was the intention of the parties to insure her while prosecuting the adventure elsewhere, or doing what was necessary to make it successful outside and beyond the prescribed limits. A voyage is the sailing of a vessel from one port or place to another port or place, and the purpose for which it is to be conducted, whether as a trading, freighting or fishing voyage, is often mentioned in policies of insurance. But this designation cannot vary or extend the description, route or termini of the voyage, as named in the policy, unless some usage, connected with the particular trade or adventure, is shown to exist. No evidence was offered of a usage in such voyage to leave the Banks and go into port for bait. So far as the evidence reported discloses any usage in that regard, it appears that for some years it had been the practice to carry out a limited amount of bait, and to rely upon obtaining an additional supply on the Banks. Such being the practice to obtain bait on the Banks, when the supply taken out was exhausted, a departure from the Banks for that purpose could not have been contemplated by the parties in making the policy. We have, therefore, a definite description of the voyage in the policy, and a usage that does not extend its provisions. The question decided in Friend v. Gloucester Ins. Co., 113 Mass. 326, arose upon a clause in a policy prohibiting a fishing vessel from sailing on a voyage east of Cape Sable after a certain date, and throws no light upon the construction to be given to the words of this policy. The decision in The Tarquin, 2 Low. 358, Fed. Cas. No. 13,755, turned upon the construction of the shipping articles of seamen, and not of a policy of insurance.

We are, therefore, of opinion, that the vessel, by leaving the Banks and going to St. Peter's for bait, departed from the voyage described in the policy, and the only question to be determined is, whether in law there has been a deviation which avoids the policy.

It may be stated, in general terms, that the assured is protected by his policy, while the vessel pursues the usual and customary course of the voyage; but any departure from the course, or delay in prosecuting it, without necessity, or just cause, is a deviation, and discharges the insurer, because another voyage has been voluntarily sub-

[3] The statement of facts is abbreviated.

stituted for that which was insured. Whether the degree or period of the risk is increased, is unimportant, as the assured has no right to substitute a different risk. Whenever, therefore, there is a manifest departure from the course of the voyage, the assured must show that it was justified by the necessity of the case. Stocker v. Harris, 3 Mass. 409, 418; Brazier v. Clap, 5 Mass. 1; Coffin v. Newburyport Ins. Co., 9 Mass. 436, 449; Kettell v. Wiggin, 13 Mass. 68.

In the case at bar, the alleged necessity arose from scarcity of bait. The plaintiff did not put on board, when the vessel sailed from Plymouth, enough for the entire trip. Squid had been plenty on the Banks during several years prior to 1874, and the plaintiff relied upon catching them there and using them for that purpose. They happened this season to be very scarce, and, after fishing three weeks, and nearly exhausting his supply, the master sailed for St. Peter's, over one hundred miles distant, procured bait, and returned to the Banks after an absence of a week. It is to be observed, that this so-called necessity did not arise from any peril insured against in the policy, or ordinarily insured against in policies of insurance, and did not involve the safety of the vessel, or of any property on board; it had relation solely to the success of the fishing adventure; and in this the defendant had no interest and has assumed no responsibility.

We are of the opinion that the claim of the plaintiff cannot be sustained; and that a necessity to justify the departure in this case cannot be found in the fact that, without going to St. Peter's for bait, the voyage would have failed to be successful or profitable to the plaintiff.

The strictness with which the courts have held the insured to the route named in the policy, is illustrated by the cases already cited, and by many others cited at the argument. Dodge v. Essex Ins. Co., 12 Gray, 65; Middlewood v. Blakes, 7 T. R. 162; Brown v. Tayleur, 4 A. & E. 241; Fernandez v. Great Western Ins. Co., 48 N. Y. 571, 8 Am. Rep. 571; Merchants' Ins. Co. v. Algeo, 32 Pa. 330. But the question to be determined here is, what is the nature and extent of the necessity or just cause which will warrant a departure from the route.

In this connection it may be well to refer to the necessities which clearly justify a departure. There is no deviation when the master is compelled by force, either to depart from his route, or delay its prosecution by the acts of his crew, Elton v. Brogden, 2 Str. 1264; Driscol v. Passmore, 1 B. & P. 200; Driscol v. Bovil, 1 B. & P. 313; or where he is detained by those in authority, or taken out of his course by a ship of war, Scott v. Thompson, 1 N. R. 181. In Phelps v. Auldjo, 2 Camp. 350, a master was ordered to sail out and examine a vessel in the offing, by a captain of a king's ship, and, it appearing that he complied without remonstrance or threat of force, it was held to be a deviation. In cases of this description there must be a vis major, compelling a departure or delay, which excuses the mas-

ter. So where the master is obliged to leave his course, or delay by stress of weather or other peril of the sea, or to go into port to repair or refit, or to re-man or recruit his crew disabled by sickness or reduced by casualties, or to avoid capture or to join convoy in time of war, there is no deviation. It is unnecessary to cite all the cases which fall within these exceptions; many of those relied on by the plaintiff are clearly within them. Dunlop v. Allan, Millar on Ins. 414; Green v. Elmslie, Peake, 212; Clark v. United Ins. Co., 7 Mass. 365, 5 Am. Dec. 50. The case last cited is put upon the express ground that the ship was prevented by causes insured against from proceeding on her route, and the departure was from necessity. See, also, Folsom v. Merchants' Ins. Co., 38 Me. 414.

Nor is the departure from the route for the purpose of saving human life a deviation; nor is a policy avoided when the ship goes out of her course to obtain necessary medical assistance for those lawfully on board. Bond v. Brig Cora, 2 Wash. C. C. 80, Fed. Cas. No. 1,621; Perkins v. Augusta Ins. Co., 10 Gray, 312, 71 Am. Dec. 654. In this class of cases the justification does not rest on the same ground as in those previously noticed. It is allowed from motives of humanity, and cannot be extended to the saving or protection of property. In all other cases the necessity must be a real and imperative necessity affecting the vessel, such as actual force preventing the master from exercising his will, peril of the sea, danger of capture, want of repair, disability of the crew, or unseaworthiness, occurring under such circumstances that the master, acting upon his best judgment for the interest of all parties, has no alternative, and is forced to leave his route, or delay its prosecution.

When the departure is caused by such a necessity, the change of route in no respect alters the insurance; because the course of a sea voyage must at times be necessarily subject to extraordinary perils of the sea, and contingencies beyond the control of the master, and in the presence of which he is forced to succumb; and when they occur, and he is obliged to depart from the usual course of the voyage, there is no deviation in the legal sense of the term, for the departure is the necessary incident of the route named in the policy, as prosecuted at the time by the ship. The probability of such occurrences is well understood; they are known perils of the voyage, and enter into the ordinary contract of marine insurance. And when the master, compelled by the necessity, does that which is for the benefit of all concerned, the act is within the intention of the policy, as much as if expressed in terms. It would be practically impossible to state in the policy all the perils which might arise in a sea voyage and excuse departure from the route; and therefore, by the rules of interpretation applicable to this species of contract, the policy is held by implication to include them. See Greene v. Pacific Ins. Co., 9 Allen, 217, 219. In such a policy as this, the necessities justifying a departure, in the absence of usage, from the route, and a visit to a port not nam-

ed, are those which are caused by some peril occurring in the prosecution of the voyage within the limits named in the policy, and not those which arise in the prosecution of the business for which the voyage was undertaken.

It is true, there is a class of cases much relied on by the plaintiff, where the test is whether the ship at the time of the alleged deviation was pursuing the object and business of the voyage. But those are cases of delay, where the ship was at the port or place named or permitted in the policy. The permission in a policy to go to certain ports or places must always be construed in reference to the purpose of the voyage. Williams v. Shee, 3 Camp. 469; 1 Arnould on Ins. §§ 141, 142. Any delay for the prosecution of other business, or any unreasonable delay in prosecuting the business of the voyage at such port is a deviation. African Merchants v. British Ins. Co., L. R. 8 Ex. 154. But if the delay was necessary in order to accomplish the objects of the voyage, and was reasonable under the circumstances of the case, then there is no deviation. Columbia Ins. Co. v. Catlett, 12 Wheat. 383, 6 L. Ed. 664; Phillips v. Irving, 7 Man. & Gr. 325. In other words, if the ship is at a place permitted, the delay shall not be a deviation, if it is necessary in the proper prosecution of the business of the voyage. But this test cannot be applied to a departure from the route to a port not named or permitted, for the purpose of adventure. In all trading voyages, for example, the ship is confined to the ports or coasts named in the policy, and she cannot depart to other places, simply because she may better prosecute the trade elsewhere. If the departure from the route, to insure the success of the adventure can be justified as a necessity, it would be difficult to state any limit to the privilege, or to the duration of the insurance, and, in the absence of permission to do so in the policy, it cannot be implied. See Kettell v. Wiggin, 13 Mass. 68; Robertson v. Columbian Ins. Co., 8 Johns. (N. Y.) 491. The plaintiff's vessel might have delayed for any reasonable time upon the Banks for the purpose of fishing or getting bait, without being guilty of deviation; and would have been protected by the policy, even without proof of usage, because fishing was the purpose of the voyage, and she could properly prosecute it within the route named in the policy. Noble v. Kennoway, 2 Doug. 510, 513. But she could not go beyond or away from the route for that purpose.

The illustration put by the defendant's counsel is apposite: "If a vessel insured to Havana and back should learn, before entering the port, that there was no cargo there with which she could be loaded, no one would say that her policy protected her in going to the nearest port where a cargo could be had." Other illustrations may be given. If a vessel insured to a particular port, having letters of credit, should find on arrival that the parties on whom they were drawn had failed, she could not go to another port for funds, and return for her cargo, and be protected by her policy. If fish had been scarce on the Banks

in 1874, it would hardly be contended that the vessel could have gone to other fishing-grounds to fish, although not more distant than St. Peter's, and yet, if she was justified by necessity in leaving to obtain bait at St. Peter's and to return in order to make the trip successful, it would be difficult to hold that the same necessity would not allow her to fish elsewhere.[4] * * *

As in the opinion of the court the trip to St. Peter's was a deviation which discharged the insurer, by the terms of the report there must be judgment for the defendant.[5]

SECTION 3.—ILLEGALITY

WARREN v. MANUFACTURERS' INS. CO.

(Supreme Judicial Court of Massachusetts, 1833. 13 Pick. 518, 25 Am. Dec. 341.)

Assumpsit on a policy of insurance on profits of a cargo, valued, on a voyage from the Port of Mansinella, in the island of Cuba, to Boston.

It appeared by the testimony of the master, that he sailed on the 19th of November, on his homeward voyage from Mansinella to Boston, with his water on deck and having no water secured under deck. Verdict for the plaintiff.[6]

WILDE, J. By the United States statute of July 20, 1790, c. 56 (29) § 9, (1 Stat. 135), it is enacted that every ship or vessel, bound on a voyage across the Atlantic ocean, shall, at the time of leaving the last port from whence she sails, have on board, well secured under deck, at least sixty gallons of water, etc., for every person on board such ship, etc., and in like proportion for shorter or longer

[4] The court's discussion of Greene v. Pacific Ins. Co., 9 Allen (Mass.) 217 (1864), and Stocker v. Harris, 3 Mass. 409 (1807), is omitted.

[5] MARINE INSURANCE ACT.—St. 6 Edw. VII, c. 41, § 49 (1)—Deviation or delay in prosecuting the voyage contemplated by the policy is excused—

(a) Where authorized by any special term in the policy; or

(b) Where caused by circumstances beyond the control of the master and his employer; or

(c) Where reasonably necessary in order to comply with an express or implied warranty; or

(d) Where reasonably necessary for the safety of the ship or subject-matter insured; or

(e) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger; or

(f) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or

(g) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

[6] The statement of facts is abbreviated.

voyages; and in case the crew of any ship or vessel, which shall not have been so provided, shall be put on short allowance in water, etc., the master or owner of such ship or vessel shall pay to each of the crew one day's wages beyond the wages agreed on, for every day they shall be so put to short allowance.

The defendant's counsel contend that the noncompliance with this requisition of the statute rendered the voyage illegal, and consequently that the policy is void. They rely on the general principle, that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void as being against the policy of the law. This general principle is well established, but like all general rules, it is not without exceptions; and the present case, we think, falls within one of the exceptions to the general rule. The rule applies to every contract which is founded on a transaction malum in se, or which is prohibited by statute on the ground of public policy; but where a contract is founded on a transaction which is prohibited for the benefit of a particular individual or individuals, and has no influence on the public welfare, such contract is not absolutely void, but only voidable by the party for whose benefit the prohibition is introduced. So where an act is enjoined under a penalty, and a contract is remotely and incidentally connected with the omission to do and perform the act enjoined, the contract is not necessarily void. Atkinson v. Abbott, 11 East, 135; Johnson v. Hudson, Id. 180; Hughes, Ins. 273; Law v. Hollingsworth, 7 T. R. 160; Dawson v. Atty, 7 East, 367; Bell v. Carstairs, 14 East, 374; Carruthers v. Gray, 15 East, 35; Ward v. Wood, 13 Mass. 539; Mitchell v. Smith, 4 Yeates (Pa.) 86; Gremare v. Valon, 2 Campb. 144.

The case of Atkinson v. Abbott, 11 East, 135, was a case on a policy of insurance, and it was contended for the defendant, that the policy was void because a false clearance had been taken out contrary to the 13 Car. II, c. 11. But it was decided that this did not avoid the policy. Lord Ellenborough remarks, that "there is nothing illegal, so as to avoid a policy, in the mere circumstance of a ship taking out a clearance for a place named in the policy, to which there is no intention of going. The statute of Car. II, only gives a penalty of £100, for taking out a false clearance; but there is nothing in that to make the voyage illegal.

In Ward v. Wood, 13 Mass. 539, the insurance was upon an armed ship, with liberty to cruise and capture the vessels and goods of the enemy. One of the grounds of defense was, that the master, in pursuance of instructions from the owners, had broken open vessels captured, and taken out part of their cargoes before condemnation; but the Court held, that although such a practice was censurable, and against the directions of a statute of the United States, the policy was not thereby rendered void; that the statute

was merely directory, obedience to the law being enforced by bonds and penalties, and that disobedience did not make the voyage illegal.

Upon the authority of those cases, and upon principle, we think it very clear, in the present case, that the voyage was not illegal by reason of the non-compliance with the statute, nor the vessel unseaworthy on this account. The statute was made for the benefit of the crew; and was afterwards extended to passengers by the United States statute of March 2, 1819, c. 170 (chapter 46, 3 Stat. 488). Both statutes are merely directory, and amount to no more than this, that the master and owner shall be liable to a penalty, if the crew or passenger shall be put on short allowance, provided the vessel shall not have been supplied with water, &c., in compliance with the directions of the statutes.

The question, whether independently of the statutes the vessel was not, in point of fact, sufficiently equipped and provided with water for the voyage, has been decided by the jury on the evidence, and no objection is made to the correctness of their decision in this respect.

Judgment according to the verdict.[7]

SECTION 4.—SUICIDE

RITTER v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Supreme Court of the United States, 1898. 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693.)

This was an action on six policies of insurance. There was a verdict and judgment in favor of the defendant, which was affirmed in the circuit court of appeals. 70 Fed. 954, 17 C. C. A. 537, 42 L. R. A. 583, 28 U. S. App. 612.

The evidence showed that the insured, William R. Runk, had taken out with the defendant company and with other companies insurance

[7] For the cases on this subject, see 2 Cooley, Briefs on Insurance, 1592. In accord with the principal case are those cases involving insurance upon buildings occupied as houses of ill-fame and on the furniture therein. See Electrova Co. v. Spring Garden Insurance Co., 156 N. C. 232, 72 S. E. 306, 35 L. R. A. (N. S.) 1216 (1911), (insurance on a piano, placed in a house of ill-fame with a view to its sale to the proprietress, not void for illegality); Conithan v. Royal Ins. Co., 91 Miss. 386, 45 South. 361, 18 L. R. A. (N. S.) 214, 124 Am. St. Rep. 701, 15 Ann. Cas. 539 (1907). Some courts, however, hold that insurance placed upon goods kept in violation of the excise laws is a part of an illegal transaction tending to the safer carrying on of the same, and void because in violation of public policy. See Kelly v. Home Ins. Co., 97 Mass. 288 (1867); Carrigan v. Lycoming Fire Ins. Co., 53 Vt. 418, 38 Am. Rep. 687 (1881). See notes in 18 L. R. A. (N. S.) 214; 40 L. R. A. 845.

upon his life to an aggregate sum of $500,000. The combined annual premiums upon the insured's policies amounted to $12,000, although Runk's income was only $8,400, and he was insolvent at the time the policies with defendant company were procured. The principal defence was that the insured deliberately and intentionally took his own life, whereby the event insured against, his death, was precipitated. The policies themselves were silent as to suicide of the insured, although the application, not a part of the contract because of non-compliance with a Pennsylvania statute, contained the usual clause excepting death by suicide from the operation of the policy.

Mr. Justice HARLAN delivered the opinion of the court.[8]

* * * * * * * * * *

No error of law having been committed in respect of the issue as to the insanity of the assured, it is to be taken as the result of the verdict that he was of sound mind when he took his life.

This brings us to the question whether the insurance company was liable, assuming that it was not a part of the contract, enforceable in Pennsylvania, that the assured should "not die by his own act, whether sane or insane," within two years from the date of the policy.

It is contended that the court erred in saying to the jury, as, in effect, it did, that intentional self-destruction, the assured being of sound mind, is in itself a defense to an action upon a life policy, even if such policy does not in express words declare that it shall be void in the event of self-destruction when the assured is in sound mind. But is it not an implied condition of such a policy that the assured will not purposely, when in sound mind, take his own life, but will leave the event of his death to depend upon some cause other than willful, deliberate self-destruction? Looking at the nature and object of life insurance, can it be supposed to be within the contemplation of either party to the contract that the company shall be liable upon its promise to pay, where the assured, in sound mind, by destroying his own life intentionally precipitates the event upon the happening of which such liability was to arise?

Life insurance imports a mutual agreement, whereby the insurer, in consideration of the payment by the assured of a named sum annually, or at certain times, stipulates to pay a larger sum at the death of the assured. The company takes into consideration, among other things, the age and health of the parents and relatives of the applicant for insurance, together with his own age, course of life, habits, and present physical condition; and the premium exacted from the assured is determined by the probable duration of his life, calculated upon the basis of past experience in the business of insurance. The results

[8] The statement of facts has been abbreviated, and that portion of the opinion upholding a finding of the jury that the insured was not insane, and holding that the contract of insurance, under the statute of Pennsylvania, contained no warranty by the insured, nor any express condition avoiding the policy in case of suicide, has been omitted.

of that experience are disclosed by standard life and annuity tables, showing at any age the probable duration of life. These tables are deemed of such value that they may be admitted in evidence for the purpose of assisting the jury in an action for personal injury, in which it is necessary to ascertain the compensation the plaintiff is entitled to recover for the loss of what he might have earned in his trade or profession but for such injury. Railroad Co. v. Putnam, 118 U. S. 545, 554, 7 Sup. Ct. 1, 30 L. Ed. 257. If a person should apply for a policy expressly providing that the company should pay the sum named if or in the event the assured, at any time during the continuance of the contract, committed self-destruction, being at the time of sound mind, it is reasonably certain that the application would be instantly rejected. It is impossible to suppose that an application of that character would be granted. If experience justifies this view, it would follow that a policy stipulating generally for the payment of the sum named in it upon the death of the assured, should not be interpreted as intended to cover the event of death caused directly and intentionally by self-destruction while the assured was in sound mind, but only death occurring in the ordinary course of his life.

That the parties to the contract did not contemplate insurance against death caused by deliberate, intentional self-destruction when the assured was in sound mind, is apparent from the "provisions, requirements, and benefits" referred to in, and made part of, the policy. They show that the policy was issued on the 20-year distribution plan, and was to be credited with its distributive share of surplus apportioned at the expiration of 20 years from the date of issue; that after three full annual premiums were paid, the company would, upon the legal surrender of the policy, before default in the payment of any premium, or within six months thereafter, issue a nonparticipating policy for a paid-up insurance, payable as provided, for the amount required by the provisions of the New York statute of May 21, 1879 (Laws N. Y. c. 347); that the assured was entitled to surrender the policy at the end of the first period of 20 years, "and the full reserve computed by the American table of mortality, and four per cent. interest, and the surplus, as defined above, will be paid therefor in cash"; that, if the assured surrendered the policy, the total cash value at the option of the policy holder should be applied "to the purchase of an annuity for life, according to the published rates of the company at the time of surrender"; that after two years from the date of the policy the only conditions that should be binding on the holder of the policy were that "he shall pay the premiums at the time and place and in the manner stipulated in the policy, and that the requirements of the company as to age, and military or naval service in time of war, shall be observed"; that in all other respects, if the policy matured after the expiration of two years, the payment of the sum insured should not be disputed; and that the party whose life was insured should always

wear a suitable truss. These provisions of the contract tend to show that the death referred to in the policy was a death occurring in the ordinary course of the life of the assured, and not by his own violent act, designed to bring about that event.

In the case of fire insurance it is well settled that although a policy, in the usual form, indemnifying against loss by fire, may cover a loss attributable merely to the negligence or carelessness of the insured, unaffected by fraud or design, it will not cover a destruction of the property by the willful act of the assured himself in setting fire to it, not for the purpose of avoiding a peril of a worse kind, but with the intention of simply effecting its destruction. Much more should it be held that it is not contemplated by a policy taken out by the person whose life is insured, and stipulating for the payment of a named sum to himself, his executors, administrators, or assigns, that the company should be liable if his death was intentionally caused by himself when in sound mind. When the policy is silent as to suicide, it is to be taken that the subject of the insurance (that is, the life of the assured) shall not be intentionally and directly, with whatever motive, destroyed by him when in sound mind. To hold otherwise is to say that the occurrence of the event upon the happening of which the company undertook to pay was intended to be left to his option. That view is against the very essence of the contract. [9]

There is another consideration supporting the contention that death intentionally caused by the act of the assured when in sound mind—the policy being silent as to suicide—is not to be deemed to have been within the contemplation of the parties; that is, that a different view would attribute to them a purpose to make a contract that could not be enforced without injury to the public. A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment. If, therefore, a policy—taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators, or assigns—expressly provided for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted.

Is the case any different in principle if such a policy is silent as to suicide, and the event insured against—the death of the assured—is brought about by his willful, deliberate act, when in sound mind? Light will be thrown on this question by some of the adjudged cases

[9] In Western Horse & Cattle Ins. Co. v. O'Neill, 21 Neb. 548, 32 N. W. 581 (1887), the plaintiff was denied a recovery for the death of a horse insured, because such death was caused by the plaintiff's ill-treatment.

having more or less bearing upon the precise point now before this court for determination.[10] * * *

For the reasons we have stated, it must be held that the death of the assured, William M. Runk, if directly and intentionally caused by himself, when in sound mind, was not a risk intended to be covered, or which could legally have been covered, by the policies in suit.

The case presents other questions, but they are of minor importance, and do not affect the substantial rights of the parties.

We perceive no error of law in the record, and the judgment is affirmed.

CAMPBELL v. SUPREME CONCLAVE IMPROVED ORDER HEPTASOPHS.

(Court of Errors and Appeals of New Jersey, 1901. 66 N. J. Law, 274, 49 Atl. 550, 54 L. R. A. 576.)

Action on a benefit certificate issued by the defendant, a fraternal order, to Dr. John G. Campbell, a member in good standing, and payable to his wife, the plaintiff herein. It was proved that Dr. Campbell, while perfectly sane, had killed himself shortly after his arrest for forgery. Judgment for the plaintiff.

The principal error alleged was the court's refusal to give the following instruction requested by defendant: "That although the by-laws of the defendant, as also the benefit certificate sued on, are silent as to suicide, there is an implied condition in the contract that, if the event upon which the risk was assured—the death of the said Campbell—was brought about by his own deliberate act while in sound mind, there can be no recovery."[11]

COLLINS, J. It has been considered by some that benefit societies are sui generis, as respects the payment of death benefits to dependents of their members, and that the uniform denial of the defense of unexcepted suicide in suits to recover on their benefit certificates is to be placed on grounds peculiar to the character of such societies. There is no doubt that such defense has never been allowed. Bac. Ben. Soc. § 337, and cases cited. But those societies have no such peculiar status. Their benefits stand on the footing of all death claims. I shall treat this case, therefore, as within the general range of life insurance. In the words of the author of a treatise on that subject published in the year 1891: "If performance by an insurer is, in general

[10] Here the court discussed the cases of Insurance Co. v. Terry, 15 Wall. (U. S.) 580, 21 L. Ed. 236 (1872); Borradaile v. Hunter, 5 Man. & G. 639 (1843); Hartman v. Insurance Co., 21 Pa. 466 (1853); Insurance Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997 (1886); Hatch v. Ins. Co., 120 Mass. 550, 21 Am. Rep. 541 (1876); Supreme Commandery v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332 (1882); Society v. Bolland (Fauntleroy's Case) 4 Bligh (N. R.) 194 (1830); Moore v. Woolsey, 4 El. & Bl. 243 (1854).

[11] The statement of facts is rewritten.

terms, conditioned on the death of the insured, there seems no valid reason why death by committing suicide should not be included; and such is the general doctrine." Cooke, Life Ins. § 41.

Contrary judicial dicta will be found in a few decisions in England and in this country, but no direct adverse adjudication until the Ritter Case, hereinafter mentioned. The case of Supreme Commandery v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332 (A. D. 1882), is sometimes cited as such an adjudication; but, on a careful reading of the report, it is evident that the opinion of the court, declared by Chief Justice Brickell with much ability from his standpoint, was not necessary to the decision of the cause. The application of the doctrine has always happened to be in cases where the insurance was effected for some designated beneficiary other than the insured; and, to that extent, no state court has departed from it, as will be seen on examination of the cases cited in the most recent publications. 3 Am. & Eng. Enc. Law (2d Ed.) 1016; Joyce, Ins. § 2653; May, Ins. (4th Ed. A. D. 1900) § 324, note "a"; 4 Berryman, Ins. Dig. (A. D. 1901) 1530 et seq.

It should be understood, of course, that I have not been speaking of insurance procured with the intention of committing suicide. That, all courts concede, is voidable because of fraud.[12] The Ritter Case arose in 1892, was decided in 1895 (70 Fed. 954, 28 U. S. App. 612, 17 C. C. A. 537, 42 L. R. A. 583), and affirmed by the United States supreme court in 1898. Ritter v. Insurance Co., 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693. There were several policies in suit, all alike in tenor, and all payable to the insured, his executors, administrators, and assigns. The real contracts, as evidenced by the applications for them, excepted death by suicide within two years, which time had not elapsed; but by virtue of a statute of Pennsylvania, where the contracts were made, the trial court had ruled out the applications because not attached to the policies, which themselves expressed no such exception. The proof was plenary that the insurance was procured with the intent to commit suicide, but, as the trial court had expressly charged the jury that there could in no case be recovery if the insured had taken his own life designedly while of sound mind, the general question was necessarily involved. The decision was that because the verdict established that Runk, the insured, had committed suicide while sane, his executor could not recover. The supreme court, speaking through Mr. Justice Harlan, held (page 160, 169 U. S., page 307, 18 Sup. Ct., and page 700, 42 L. Ed.) that the death of the insured, "if directly and intentionally caused by himself when in sound mind, was not a risk intended to be covered, or which could legally have been covered, by the policies in suit."

[12] See, in accord, Smith v. Society, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616 (1890); Supreme Conclave Improved Order of Heptasophs v. Miles, 92 Md. 613, 48 Atl. 845, 84 Am. St. Rep. 528 (1901); Parker v. Association, 108 Iowa, 117, 78 N. W. 826 (1899).

Diligent research has led to a discovery of no other reported case directly adjudging that suicide will bar recovery upon a policy not excepting it in express terms, and not procured with the intention of committing suicide, except the later one of Hopkins v. Assurance Co. (C. C.) 94 Fed. 729, where a United States circuit court, being bound by the Ritter Case, extended, and, I think logically extended, the bar against recovery to a policy taken out by the insured for the benefit of his wife. The judgment was affirmed, however, upon other grounds. 99 Fed. 199, 40 C. C. A. 1.

I will consider first the proposition that sane suicide, though unexcepted in express terms, is not a risk intended to be covered by a life insurance contract. In the early life policies, death by suicide was excepted from the liability of the insurer; and in some cases this was expressed to be so, whether the insured was sane or insane at the time of the act. In a note to the case of Borradaile v. Hunter, 5 Man. & G. 639, decided in the year 1843, there appears a list of the varying forms of the exception as appearing in the policies customarily issued by 18 of the leading companies of England. Adjudication in this country, contrary to that in England, that the condition of sanity was implied in a general exception of suicide, led to the common expression in subsequent policies of a contrary intent. Later, as such stringency was seen to be unwise, it was relaxed, and still later, as the outcome of contests over sanity showed any exception to be futile, and as such an exception discouraged insurance, it came to be omitted altogether, or made of very short duration.

The history of insurance makes difficult the argument that the exception is not now expressed because necessarily implied. The contrary has been the course of evolution in the analogous case of death resulting as a punishment for crime. In an early English decision,—Fauntleroy's Case, 4 Bligh (N. R.) 194; A. D. 1830,—such a death was held to be an implied exception; but the effect of the raising of the question, notwithstanding its decision favorably to the insurer, was to lead to the general introduction into policies of an express exception. Chief Justice Brickell, of Alabama, was alive to this situation when he expressed a strong, though not deterrent, reluctance "to introduce, by construction or implication, exceptions into such contracts, which usually contain special exceptions." Supreme Commandery v. Ainsworth, 71 Ala. 436, 447, 46 Am. Rep. 332, 337.

Of course, the question is an open one, and the views of so influential a tribunal as the supreme court of the United States deserve most careful consideration. The reason for implying the exception is thus stated by Judge Harlan (169 U. S. 153, 18 Sup. Ct. 305, 42 L. Ed. 698): "In the case of fire insurance it is well settled that although a policy in the usual form, indemnifying against loss by fire, may cover a loss attributable merely to the negligence or carelessness of the insured, unaffected by fraud or design, it will not cover a destruction of the

property by the willful act of the assured himself in setting fire to it, not for the purpose of avoiding a peril of a worse kind, but with the intention of simply effecting its destruction. Much more should it be held that it is not contemplated by a policy taken out by the person whose life is insured, and stipulating for the payment of a named sum to himself, his executors, administrators, or assigns, that the company should be liable if his death was intentionally caused by himself when in sound mind. When the policy is silent as to suicide, it is to be taken that the subject of insurance (that is, the life of the assured) shall not be intentionally and directly, with whatever motive, destroyed by him when in sound mind. To hold otherwise is to say that the occurrence of the event upon the happening of which the company undertook to pay was intended to be left to his option. This view is against the very essence of the contract."

The conclusion stated is a plain non sequitur. Suicide is only one of many ways that may determine the event of death. Insurance rates are based upon an average expectancy of life derived from experience tables embracing suicide as well as all other causes of mortality. Many intelligent persons believe that suicide self-evinces a morbid state of mind, and insurers, in a large volume of business, may well offset the natural love of life against the infrequent impulse of self-destruction. The supposed analogy to other insurance is not new. In Moore v. Woolsey, 4 El. & Bl. 243, 254, Lord Campbell said, obiter: "If a man insures his life for a year, and commits suicide within the year, his executors cannot recover on a policy, as the owner of a ship who insures her for a year cannot recover on a policy if within the year he causes her to be sunk." The reasoning is specious and the analogy is false. It is quite right that willful and unnecessary destruction of the subject of fire or marine insurance should at the same time destroy the insurer's liability. The courts therefore imply in such a case an exception from the general terms of the contract, because that must have been intended. But the case of life insurance is not parallel. Strict insurance is indemnity. Voluntary and unnecessary destruction of the property insured is inconsistent with the basis of the contract, but the basis of that which by a misnomer is called "insurance upon life" is altogether different. That is an arbitrary agreement to pay a fixed sum upon the happening of an inevitable event, to wit, the death of the insured, without regard to the value of his life or the loss sustained by the assured. That a contract of life insurance is not a contract of indemnity was decided in the exchequer chamber in 1854. Dalby v. Assurance Co., 15 C. B. 365, overruling Godsall v. Boldero, 9 East, 72. There is no force in any argument derived from contracts of indemnity.

Another reason not expressly stated by Judge Harlan, but frequently assigned in judicial dicta for the implication declared by him, is that without it the insured would be deriving a benefit from his own wrong-

ful act, which will never be presumed to be within the intention of contracting parties. For example, recovery on a life insurance policy assigned by the insured to his creditor, who afterwards murdered him, has rightfully been denied. Insurance Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997. Granting the inherent wrongfulness of suicide, which is matter for the moralist rather than the judge, this doctrine fails when applied thereto. No one can in this world derive a benefit from his own death. By that final event all earthly profit ends for him to whom it comes. He is for this life equally beyond gain and loss, and as to him the rules that govern mundane intercourse become no longer applicable. Those who derive the benefit will have done no wrong.

But it is said that suicide is a fraud on the insurer. To procure insurance with intent to commit suicide is a fraud on the insurer that should defeat recovery at the option of the insurer, and, with all the incidents of a rescission, will avoid the contract, even as against beneficiaries or assignees. Smith v. Society, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616. But to argue that suicide, not previously intended, is such a fraud as to defeat recovery, is to beg the very question of what is the contract; and the argument assumes that insurance rates are fixed upon a basis excluding death by suicide, while, as we have seen, the contrary must be the case, for the experience tables include all forms of death. Moreover, it would be next to impossible to fasten the fraudulent intent. The motives for suicide are difficult to fathom, and are usually complex. In the case in hand, Dr. Campbell doubtless took his life through overwhelming chagrin due to arrest on a criminal charge. It is highly improbable that he thought at all of his insurance. To submit to a jury in each case the intent of the act would be practically fruitless. A general imperative rule in all cases must be established, and such seems to be the view of Judge Harlan; for he says that intentional self-destruction, with whatever motive, is impliedly excepted from the contract. As a mere matter of construction, it is of no importance what rule is to govern future contracts; but, in view of the historical aspect of the subject, the reading into contracts of life insurance this unexpressed exception will be sure to work great hardship. Many policies are being carried by creditors or others interested without a formal assignment, or the possibility of compelling one, except by consent of the insurer. These persons have rightly felt secure against recklessness or malignity extending even to suicide, and their investments should not be imperiled.

Lastly to be considered is the proposition that intentional suicide when in sound mind is not a risk which can legally be covered by insurance. This rests upon a postulated public policy. Judge Harlan says: "A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of

justice, or be made the foundation of its judgment. If, therefore, a policy taken out by a person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators, or assigns, expressly provided for the payment of the sum stipulated when or if the assured in sound mind took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him or to whom he was indebted." We are not concerned with an express contract to pay in case of suicide, but with a normal life insurance policy. Payment is to be made upon the event of death, and the risk of death by suicide, as applied to the volume of insurance, is almost infinitesimal. The real question is whether it is against sound public policy for the insurer to assume the risk.

It is urged that parties may not contract for even a possible obligation resting on criminality. Doubtless such is the law. Fauntleroy's Case, ubi supra, rests upon that principle; and it has recent illustration in the state of Massachusetts, where the supreme court denied insurance because the death of an insured woman resulted from a criminal abortion. Hatch v. Insurance Co., 120 Mass. 550, 21 Am. Rep. 541. But suicide is not criminal in New Jersey. Punishment is of the essence of crime, and suicide is not punishable here. Blackstone defines a crime or misdemeanor to be "an act committed or omitted in violation of a public law either forbidding or commanding it." 4 Bl. Comm. 5. A recent writer more tersely says, "A crime is an act of omission or commission punishable as an offense against the state." McClain, Cr. Law, § 4. At common law suicide was both criminal and felonious, although the punishment, except that of anticipatory dread, was of necessity visited upon the innocent, unless insensate clay can be said to have been punished by the burial in the highway and the driven stake. But in this country, generally, there is neither forfeiture of goods nor other penalty attached to suicide, which is therefore "little more than the shadow of a crime." Patterson v. Insurance Co., 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899. That case decides that suicide does not fall within the usual exception in a life insurance policy of death resulting from a violation of law. The opinion of Winslow, J., well merits study on all the phases of the subject now sub judice. It is a model of terse, logical reasoning, but, like most judicial utterances since the Ritter Case, which is evidently disapproved, it is confined to cases where the insurance is payable to a beneficiary. In New York, also, it has been held that death by suicide does not result from violation of law, although by an exclusive penal code an unsuccessful attempt to commit suicide is there a crime, while suicide is not. Darrow v. Society, 116 N. Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. Rep. 430. In New Jersey neither suicide nor attempt to commit suicide has, since 1796, at least,

been criminal. This results from the enactment in that year that no conviction or judgment for any offense against the state shall make or work forfeiture of estate. Paterson's Laws, p. 221, § 75, continued to the latest revision of our criminal procedure act (P. L. 1898, p. 919, § 153).

As to the abstract immorality of suicide generally, opinions may differ, but all will admit that in some cases it is ethically defensible. Else, how could a man "lay down his life for his friend"? Suicide may be self-sacrifice, as when a woman slays herself to save her honor. Sometimes self-destruction, humanly speaking, is excusable, as where a man curtails by weeks or months the agony of an incurable disease. It will not do to resort to the argument that in such cases there is no "felonious intent." As to direct suicide, all that the common law required to make one a felo de se was that he should be of years of discretion and in his senses, and should mean to kill himself. 4 Bl. Comm. 189; Hale, P. C. 411. Extenuation could only be considered by the king, who would "execute judgment in mercy." Judge Harlan has not yielded to this argument; for, "with whatever motive" self-destruction is accomplished, it, in his view, defeats recovery. Inquiry into an intent, formed after procuring insurance, to defraud the insurer by suicide, has seemed to me impracticable. Inquiry into any other evil intent seems just as impracticable. On whom would rest the burden of proof, and how could complex motives be unraveled? Some general rule must control this question of public policy. Cases cannot be individualized.

As to the public good requiring the discouragement of suicide, there may be also two opinions. The paternal theory of government does not here prevail. The common law condemned suicide, according to Hale and Blackstone, ubi supra, not only for religious reason, but for the temporal one that the king has an interest in the preservation of all his subjects, and doubtless the same is true of an organized commonwealth and its citizens; but I cannot see that the public good is more concerned to prolong a life that may be worthless to the public than to secure to creditors their just demands, or to afford a maintenance to wife and children. Insurers may guard their interests in their contracts. I know no public policy more useful than that which holds contractors to performance. That opinions of what is sound public policy upon this subject are not all alike is shown by that which has been declared in the great state of Missouri by its legislature. For many years no defense of suicide in a suit to collect life insurance has been permitted unless it is shown to the satisfaction of the court or jury at the trial that the insured contemplated suicide at the time of application for the policy, and any contrary provision in a policy is made void. Rev. St. Mo. 1889, § 5855.

If it be public policy to interfere with contracts in order to dis-

courage suicide, then ought the contract of a creditor insuring the life of his debtor, or a wife insuring the life of her husband, to be defeated by the suicide of the insured, for the same motive of self-destruction for the benefit of the assured will be impelling in such cases as in a case where the contract is directly with the insured; yet it has never been suggested that one having an insurable interest in another's life may not at his own cost himself contract insurance on that life, or take an assignment of an existing policy, without the risk of forfeiture by the suicide of the insured. Indeed, it has been held otherwise even in England, where suicide is criminal. Cook v. Black, 1 Hare, 390; Moore v. Woolsey, ubi supra. The fact that the insured pays the premiums and purchases insurance for a designated beneficiary, or for the benefit of his estate, can make no difference in his mental attitude. He can gain nothing by his death, and normally his estate will go either to his creditors or to his widow and next of kin. I see no sensible reason to affirm the contract in one case and disallow it in the other.

I have said that no adjudged case has permitted suicide as a defense against a beneficiary other than the insured. This is true, with one exception, even where the decision in the Ritter Case has been recognized as sound or controlling. Judge Harlan himself was very careful to go no further than the case required. The exception to which I have alluded is the Hopkins Case, above cited, but to my mind the extension in that case was logical. What difference does it make whether a man contracting insurance designates in the contract the beneficiary, or leaves that designation to the law or his last will and testament? The contract is with him, and it is no more consistent with public policy that he should be allowed to contract that his suicide should not forfeit the right of a beneficiary named in the policy to receive the insurance money, than that he should be allowed to contract that such suicide should not forfeit the right of those who otherwise would receive it as creditors, distributees, or legatees of his estate. The decisions, since the Ritter Case, denying suicide as a defense to silent policies, must, logically, either reprobate that case, or distinguish it only on the ground that, as against a beneficiary named, the exception of the death of the insured by suicide cannot be constructively implied.

I conclude that in no case should the suicide of an insured person defeat recovery upon a contract of life insurance not procured by him with the intention of committing suicide, unless the contract so provides in express terms. Presumably the contract in this case was consummated in New Jersey, but if we look to Maryland, the state of the defendant's incorporation, for the law which is to govern, it will be found no different. In a very recent decision of the court of appeals of that state, in a controversy with this same defendant, after full consideration of both the grounds of objection to recovery that I have been discussing, the same conclusion, and for substantially the same

reasons, has been reached. Supreme Conclave v. Miles, 92 Md. 613, 48 Atl. 845, 84 Am. St. Rep. 528. [13]

The direction of verdict for plaintiff was correct, and the judgment is affirmed.[14]

[13] The dissenting opinion of Van Syckel, J., containing a spirited defense of Ritter v. Insurance Co., 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693 (1898), and the specially concurring opinion of Garrison, J., are omitted. The Chancellor and four of the Associate Judges concurred in the dissenting opinion of Van Syckel, J.

[14] The weight of authority is with the principal case. See Patterson v. Ins. Co., 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899 (1898); Supreme Conclave v. Miles, 92 Md. 613, 48 Atl. 845, 84 Am. St. Rep. 528 (1901); Grand Lodge Independent Order of Mutual Aid v. Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123 (1897). Many courts, however, make a distinction between policies payable to the estate of the insured and those payable to a third person as beneficiary. Suicide is held not to be a defense in the latter cases, on the ground that the beneficiary has a vested interest in the policy, which cannot be defeated by the wrongful act of the insured. Fitch v. Insurance Co., 59 N. Y. 557, 17 Am. Rep. 372 (1875); Patterson v. Insurance Co., 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899 (1898); Seiler v. Association, 105 Iowa, 87, 74 N. W. 941, 43 L. R. A. 537 (1898). This result is obtained even in the cases of mutual benefit insurance, where the beneficiary has no vested rights in the policy. Grand Legion v. Beaty, 224 Ill. 346, 79 N. E. 565, 8 L. R. A. (N. S.) 1124, 8 Ann. Cas. 160 (1906); Parker v. Des Moines Life Ass'n, 108 Iowa, 117, 78 N. W. 826 (1899). But other courts hold that the same principles should apply to certificates in a fraternal order as to policies payable to the estate of the insured. See Shipman v. Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347 (1903); Davis v. Supreme Council Royal Arcanum, 195 Mass. 402, 81 N. E. 294, 10 L. R. A. (N. S.) 722, 11 Ann. Cas. 777 (1907).

In Davis v. Supreme Council Royal Arcanum, 195 Mass. 402, 81 N. E. 294, 10 L. R. A. (N. S.) 722, 11 Ann. Cas. 777 (1907), the court denies the soundness of this distinction made in favor of policies made payable to third parties as beneficiaries: "The writers of the opinions in these cases seem to ignore the fact that, by the true construction of the contract, as between the association and the insured, there is an implied exception of death by suicide from the statement that death creates a liability, and that, as the contract as to the person to be paid is all the while in the control of the insured up to the time of his death, it should not be treated as larger and more beneficial in the hands of the beneficiary than it is in the hands of the insured. * * * It is questionable whether some of the cases have not gone too far in holding ordinary life insurance companies liable to beneficiaries for death by suicide when the policy was silent on that subject. It is true, as is said in some of these cases, that the insured cannot deprive a beneficiary of his rights by his subsequent misconduct. But it is equally true that if the original contract impliedly excepts from its provisions cases of death by suicide, and if that is its true construction when considered in reference to the beneficiary as well as in reference to the insured, there is no more liability to the beneficiary for such a death than there would be to the executor or administrator of the insured."

The tendency of the courts to consider suicide of the insured as properly included among the risks insured against is shown by the case of Mutual Life Ins. Co. v. Durden, 9 Ga. App. 797, 72 S. E. 295 (1911). In this case it was held that the provision of the policy that "the company shall not be liable hereunder in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the issuance of the policy," constituted a waiver by the insurer of the benefit of the Georgia statute (Civ. Code 1910, § 2500), providing that death by suicide released the insurer from his obligation. The court recognized the rule that a statute intended to effectuate a rule of public policy cannot be waived, but considered that

SECTION 5.—DEATH BY LEGAL EXECUTION

COLLINS v. METROPOLITAN LIFE INS. CO.

(Supreme Court of Illinois, 1907. 232 Ill. 37, 83 N. E. 542, 14 L. R. A. [N. S.] 356, 122 Am. St. Rep. 54, 13 Ann. Cas. 129.)

Action on a life insurance policy issued by the Metropolitan Life Insurance Company on the life of Robert Kilpatrick. The provisions of the policy are set out in the declaration, one of which is that the policy should be incontestable after two years except for the nonpayment of premiums or for fraud. Two defenses are set up in the pleas of the insurance company: First, that Kilpatrick was indicted, tried, convicted, and executed for murder. * * *[15] From a judgment for defendant, affirmed by the Appellate Court, plaintiff brings error. Reversed and remanded, with directions.

VICKERS, J. Whether the legal execution of the assured for a crime committed by him constitutes a defense to an action by his legal representative on a life insurance policy is a question of first impression in this state. Where this defense has been sustained, it is generally

there was no clearly defined public policy opposed to the waiver of the statute.

In the modern life insurance policies suicide is almost uniformly expressly excepted from the risks insured against. This is held to be a reasonable provision. Northwestern Mutual Ins. Co. v. Churchill, 105 Ill. App. 159 (1902). Unless otherwise specified, it covers only self-destruction while sane. Accident Ins. Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740 (1887).

For a collection of the cases bearing on suicide as an excepted risk, see Vance on Insurance, p. 516; 4 Cooley, Briefs on Insurance, 3224; note in 8 L. R. A. (N. S.) 1124; notes in 11 Harv. Law Rev. 547, and 21 Harv. Law Rev. 530.

EVIDENCE OF SUICIDE—PROOFS OF LOSS.—"11. When the insurance company defends upon the ground of suicide, the burden is upon the company to establish such contention by a preponderance of the evidence. While the authorities are not uniform upon the question, the weight of authority seems to hold that the presumption against suicide and in favor of death from natural causes is not overcome by the introduction at the trial of the proofs of death, or even of the verdict of a coroner's jury. 25 Cyc. 930, 931; Union Mut. v. Payne, 105 Fed. 172, 45 C. C. A. 193 (1900); Supreme Lodge v. Beck, 94 Fed. 751, 36 C. C. A. 467 (1899); Goldschmidt v. Mutual Life, 102 N. Y. 486, 7 N. E. 408 (1886). Contra, see Spruill v. Northwestern, 120 N. C. 141, 27 S. E. 39 (1897); Newark Mutual v. Newton, 22 Wall. (U. S.) 32, 22 L. Ed. 793 (1874). In the present case the cause of death is stated to be suicide in one of the affidavits composing the proofs of death. It is a matter of common knowledge that proofs of death are made under conditions of haste, for the purpose of complying with the rules of the company, and are generally made under circumstances which are not conducive to accuracy. The conclusions are frequently stated from imperfectly formed views, and frequently from the statements of others."—Gilbert, J., in Mutual Life Ins. Co. v. Durden, 9 Ga. App. 797, 72 S. E. 295 (1911).

[15] Those parts of the statement of facts and of the opinion relating to the second plea (res judicata) are omitted.

upon the ground that it is contrary to public policy to permit a recovery where the death is in consequence of a violation of the law. This is the basis of the decision of this case by the Appellate Court, and is the main reason urged here in support of the judgment below.

It is said by the defendant in error that to permit a recovery on this policy would be contrary to the public policy of this state, as it would tend to remove a restraint thrown around persons who are tempted to commit crimes. The argument rests upon the same grounds that were urged centuries ago in support of the now obsolete doctrine of attainder and corruption of blood. In the earlier history of the common law various consequences other than the punishment of the offender followed conviction for felony, and in some instances the causing of a death by mere misadventure or negligence was visited with certain forfeitures and penalties. Without attempting historical accuracy, the law of England provided that all the property, real and personal, of one attainted should be forfeited and his blood so corrupted that nothing could pass by inheritance to, from, or through him. He could not sue, except to have his attainder reversed. Thus the wife, children, and collateral relations of the attainted person suffered with him. As said by Bishop: "When the tree fell, it brought down all its branches." 1 Bishop on Crim. Law, § 968. As further illustrating the rigor of the old English law, it was provided that, if a man be indicted for felony and flees, he forfeits by flight his goods, and "he that committeth homicide by misadventure shall forfeit his goods; and so shall he which doth kill a man in his own defense forfeit his goods; and likewise he that killeth himself and is felo de se shall forfeit his goods; and he that being indicted to felony shall stand mute and not answer directly, or challenge peremptorily above twenty persons, shall forfeit his goods."

These ancient doctrines, whether resting upon grounds of public policy or upon the other reason which is sometimes put forth, that the government is entitled to the goods of the felon as compensation for the injury done and the expense occasioned, have failed to satisfy the conscience and judgment of courts of later periods in England, and have never had a potential existence in American jurisprudence. The Constitution of the United States provides that "no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted," and by an act of Congress passed in 1790 all corruption of blood and forfeitures, whether for treason or felony, as to convictions under the federal law, were abolished. This doctrine never had any existence in Illinois, even in the modified form which seems to be recognized in the federal Constitution. In all the Constitutions adopted in this state a provision similar to the one found in section 11 of article 2 of the Constitution of 1870 is to be found. Thus, the Constitution of 1818 provided: "No ex post facto law, nor any other law impairing the validity of contracts, shall ever be made, and no conviction shall work corruption of blood or forfeiture of estate."

The Constitution of 1848 contained the same clause, while the Constitution of 1870 declares: "All penalties shall be proportioned to the nature of the offense, and no conviction shall work corruption of blood or forfeiture of estate; nor shall any person be transported out of the state for any offense committed within the same."

There are in these several constitutional provisions clear and unequivocal declarations of the public policy of this state, to the effect that no forfeiture of property rights shall follow conviction for crime. This public policy is further manifested by our statute in regard to descent of property in case of intestacy, and the general power of disposition of property by will, conferred by our statute of wills. In none of these statutes is the right conferred in respect to property made to depend on the manner or cause of the death of the owner. To hold that the property of one who was executed in this state for a crime was not subject to the same law of descent and devise as property generally would be nothing less than judicial legislation by ingrafting exceptions in statutes where none exist by the language of the law. Statutes of descent and devise are legislative declarations of the public policy of the state on the subjects to which they relate. The rules of the common law on these subjects have been wholly superseded by our statutes. Kochersperger v. Drake, 167 Ill. 122, 47 N. E. 321, 41 L. R. A. 446; Storrs v. St. Luke's Hospital, 180 Ill. 368, 54 N. E. 185, 72 Am. St. Rep. 211; Sayles v. Christie, 187 Ill. 420, 58 N. E. 480; In re Mulford, 217 Ill. 242, 75 N. E. 345, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986.

Statutes of descent and devise similar to ours have generally been held not to exclude an heir or devisee from the benefits of these statutes on the ground that the heir or devisee had feloniously and intentionally destroyed the life of the person from whom the legacy or inheritance was expected. The Court of Appeals of New York, in Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819, by a divided court decided against the right of a devisee who had murdered the testator to take under the will; but this case has not generally been regarded as sound by the other courts. In a well-considered case in Nebraska the Supreme Court of that state retracted its first opinion in the case, and upon a rehearing held that, under a statute of descent similar to ours, the fact that the father had feloniously murdered his child did not prevent the operation of the statute of descent, and that the felon inherited the estate of his victim, Shellenberger v. Ransom, 41 Neb. 641, 59 N. W. 935, 25 L. R. A. 564.[16] * * *

In Holdom v. Ancient Order of United Workmen, 159 Ill. 619, 43 N. E. 772, 31 L. R. A. 67, 50 Am. St. Rep. 183, this court held that

[16] The court's discussion of Owens v. Owens, 100 N. C. 240, 6 S. E. 794 (1888), Carpenter's Estate, 170 Pa. 203, 32 Atl. 637, 29 L. R. A. 145, 50 Am. St. Rep. 765 (1895), and Deem v. Millikin, 6 Ohio Cir. Ct. R. 357 (1892), which are in accord with Shellenberger v. Ransom, 41 Neb. 631, 59 N. W. 935, 25 L. R. A. 564 (1894), is omitted.

an insane beneficiary who murdered the assured could recover. The cases of Shellenberger v. Ransom and Owens v. Owens, 100 N. C. 240, 6 S. E. 794, are cited with approval by this court upon the general proposition that for the courts to declare a forfeiture for crime where the Legislature has remained silent is legislation by judicial tribunals—a subject with which they have no concern. These cases are much stronger than the one at bar. There is much more room for holding that one who has been the guilty agent in accelerating a death as a result of which he expects to come into an inheritance or legacy or a benefit under an insurance policy should be denied the benefits of his own wrong on grounds of public policy, than there is for denying innocent heirs, devisees, or beneficiaries their rights because the person through whom they claim was executed for crime. This court held in Knights of Honor v. Menkhausen, 209 Ill. 277, 70 N. E. 567, that, while a beneficiary who has murdered the assured could not recover, still the heirs of the assured who are within the class of eligible beneficiaries were entitled to recover, although not named in the certificate as beneficiaries.

The public policy of a state is to be sought for in its Constitution, legislative enactments, and judicial decisions. When the sovereign power of the state has by written Constitution declared the public policy of the state on a particular subject, the legislative and judicial departments of the government must accept such declaration as final. When the Legislature has declared, by law, the public policy of the state, the judicial department must remain silent, and, if a modification or change in such policy is desired, the lawmaking department must be applied to, and not the judiciary, whose function is to declare the law, but not to make it. Limiting their actions to questions left open by the Constitution and the statutes, courts may, no doubt, apply the principles of the common law to the requirements of the social, moral, and material conditions of the people of the state, and declare what rule of public policy seems best adapted to promote the peace, good order, and general welfare of the community. Hence arises the rule that the decisions of its courts are to be investigated in determining the public policy of any government.

An insurance policy payable to the estate or personal representatives of the assured is a species of property. It is in the nature of a chose in action, which, subject to certain conditions, varying according to the terms of the contract, is payable upon the contingency of death or at a stated time. Life insurance has become an important factor in the commercial and social life of our people. To protect their credit, save their estates from embarrassment, and provide for dependent ones, the people of this state pay annually over $30,000,000 in premiums for life insurance. See Official Report of Commissioner of Insurance, part 2, p. 6. The amount of insurance carried is approximately $1,000,000,000. Why should this enormous property interest be subject to any different conditions than those applying to any

other property owned by the people? If a man who is executed for crime has at his death $1,000 in real estate, $1,000 in chattels, and $1,000 life insurance payable to his estate, his real estate descends to his heir, and his personal chattels to his administrator, but the $1,000 life insurance must be left in the hands of the company who has received the premiums because it is said to be contrary to public policy to require the company to pay, lest by so doing it lend encouragement to other policy holders to seek murder, and execution therefor, in order that their estates or heirs might profit thereby. This is defendant in error's position. This contention seems to border closely on the absurd. We know of no rule of public policy in this state that will enforce this species of forfeiture, but there is a rule of law which has often been applied when two parties make a valid contract and the same has been completely performed by one party and nothing remains except the performance by the other, which will compel performance or award damages for the default against the delinquent party.

We are aware that courts have not always reached the same conclusion upon this question. So far as we are advised, all the cases in which the opposite conclusion has been reached are based upon the English case, Amicable Society v. Bolland, 4 Bligh (N. R.) 194, decided by the House of Lords in 1830. The facts in that case as stated by the Lord Chancellor are: "In January, 1815, Henry Fauntleroy insured his life with the Amicable Insurance Society. In the month of May, in the same year, he committed a forgery on the Bank of England. He continued to pay the premiums upon his insurance for a considerable period of time. In the year 1824 he was apprehended, and on the 29th of October in that year he was declared a bankrupt, and an assignment of his effects was made to the respondent. On the following day, the 30th of October, he was tried for forgery, found guilty, and sentenced to death, and in the month of November following was executed." The court held that there could be no recovery. The grounds of the decision were that to allow a recovery would "take away one of those restraints operating on the minds of men against the commission of crime."

It should be borne in mind that forfeitures for the commission of crime were enforced in England at the time of this decision, and continued to be, with more or less severity, until abolished by 33 and 34 Victoria, passed in 1870. 1 Bouvier's Law Dict. p. 446; Schouler on Wills, § 33. The decison in the Bolland Case was based on the ground of public policy, and no doubt was in strict accordance with the established policy of Great Britain at that time. As a declaration of the public policy of the English government at the time the decision was announced, it must stand as conclusive evidence of such policy; but it is no evidence whatever that the same public policy prevails in any other nation or government. Each nation or state having the power to adopt a Constitution and legislate for itself necessarily

has the inherent power to declare its own rules of public policy. There is nothing in international law or the comity between our states that requires our courts to enforce the consequences following the conviction for felony in obedience to the public policy of the state where the conviction is had, when to do so would be to depart from our own public policy on the same subject. A few citations will establish this principle.[17] * * *

The question, therefore, is one to be determined by our own local rules of public policy. In view of these rules as evidenced by our Constitution and the statutes above referred to, we conclude that the execution of the assured for crime is no defense against an action upon a life insurance policy held by the person executed, in the absence of a stipulation exempting the company from liability for a death from this cause.

In view of the conclusions we have reached upon the question already discussed, the effect of the incontestable clause in this policy becomes of no importance and need not be further alluded to. * * *

The judgment of the circuit court of Cook county and of the Appellate Court for the First District are reversed, and the cause remanded to the circuit court of Cook county, with directions to sustain the demurrer to the pleas, and for further proceedings in conformity with the views herein expressed.

Reversed and remanded, with directions.[18]

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY v. McCUE.

(Supreme Court of the United States, 1912. 223 U. S. 234, 32 Sup. Ct. 220, 56 L. Ed. 419, 38 L. R. A. [N. S.] 57.)

On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree (93 C. C. A. 71, 167 Fed. 435) which, reversing a decree of the Circuit Court for the Western District of Virginia, upheld the right to recover upon a policy of life insurance for a death caused by legal execution for crime. Judgment of Circuit Court of Appeals reversed, and that of the Circuit Court affirmed.

The original suit was in equity upon a policy of insurance for $15,000, on the life of Jas. S. McCue, issued by the defendant, incorporated under the laws of Wisconsin, and assigned to the plaintiffs, children of the assured. Shortly after the issue of the policy, Mr. McCue murdered his wife, and after due trial and conviction was hanged.

Mr. Justice McKENNA delivered the opinion of the court:

The question in the case is whether death by the hand of the law in

[17] These citations are omitted.

[18] For a discussion of the principal case, see note in 21 Harv. Law Rev. 530.

execution of a conviction and sentence for murder is covered by a policy of life insurance, though such manner of death is not excepted from the policy, there being no question of the justness of the sentence.[19] * * *

The question was before this court in Burt v. Union Cent. L. Ins. Co., 187 U. S. 362, 47 L. Ed. 216, 23 Sup. Ct. 139.[20] In the policy passed on, as in the policy in the case at bar, there was no provision excluding death by the law. It was decided, however, that such must be considered its effect, though the policy contained nothing covering such contingency. These direct questions were asked: "Do insurance policies insure against crime? Is that a risk which enters into and becomes a part of the contract?" And answering, after discussion, we said: "It cannot be that one of the risks covered by a contract of insurance is the crime of the insured. There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy. Public policy forbids the insertion in a contract of a condition which would tend to induce crime, and as it forbids the introduction of such a stipulation, it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for." Cases were cited, among others Ritter v. Mutual L. Ins. Co., 169 U. S. 139, 42 L. Ed. 693, 18 Sup. Ct. 300. There it was held that a life insurance policy taken out by the insured for the benefit of his estate was avoided when one of sound mind intentionally took his life, irrespective of the question whether there was a stipulation in the policy or not. And the conclusion was based, among other considerations, upon public policy, the court saying that "a contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment."

These cases must be accepted as expressing the views of this court as to the public policy which must determine the validity of insurance policies, and which they cannot transcend even by explicit declaration, much less be held to transcend by omissions or implications, and we pass by, therefore, the very interesting argument of counsel for respondents as to the indefinite and variable notions which may be entertained of such policy according to times and places and the temperaments of courts, and the danger of permitting its uncertain conceptions to control or supersede the freedom of parties to make and to be bound by contracts, deliberately made. We come, therefore, immediately to the special contention of respondents, that the contract in controversy is a Wisconsin contract, and is not offensive to the public policy of that state or to its laws, but was indeed, as it is contend-

[19] The statement of facts as given in the opinion of the court is omitted.

[20] For a criticism of Burt v. Union Central Life Ins. Co., 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216 (1902), see notes in 14 Harv. Law Rev. 624, and 16 Harv. Law Rev. 453.

ed, made in conformity to the laws of that state, and carries all of their obligations.[21] * * *

The question before us, and the only question, is: What rights did McCue's estate and children get by his policy? And we are brought back to the simple dispute as to whether the policy covers death by the hand of the law. This court has pronounced on that dispute, and its ruling must prevail in the federal courts of Virginia, in which state the contract was made. And it is consonant with the ruling in the state courts. In Plunkett v. Supreme Conclave, I. O. H., 105 Va. 643, 55 S. E. 9, a certificate of membership in the conclave, which was issued to one Charles W. Plunkett, his wife being beneficiary, was considered. One of the conditions was that Plunkett comply with the laws, rules, and regulations then governing the conclave, or that might in the future be enacted. There was no provision against suicide in the laws, rules, or regulations when the certificate was issued. Such a provision was subsequently enacted. Plunkett committed suicide, and the order refused to pay benefits. Plunkett's wife brought suit to recover them, and asserted a vested interest in the benefits under the certificate. The contention was rejected. The trial court held that the forfeiture of the rights under the certificate, if the insured while sane committed suicide, was valid, because (1) it involved no vested right of the insured, and (2) because it was a fundamental, though unexpressed, part of the original contract that the insured should not intentionally cause his own death. And the court added: "Inasmuch as the original contract and by-laws were silent upon the subject of suicide by the insured while sane, the new by-law is valid, because there can be no such thing as a vested right for a sane man to commit suicide, and for the further reason that it is nothing more than the written expression of the provision which the law had read into the contract at its inception."

The supreme court of appeals affirmed the judgment, quoting the reasoning of the trial court, and added to it the considerations of public policy expressed in the Burt Case and Ritter Case, supra, and other cases. If the public policy of Virginia were the same as, it is contended, that of Wisconsin is, whether this court should have to yield it, we are not called upon to decide.

Being of opinion that McCue's policy was a Virginia contract, it may be unnecessary to review the cases relied on by the respondents, which they contend declare the public policy of the state of Wisconsin. It may, however, be said that the cases are not absolutely definite Two cases only are cited, McCoy v. Northwestern Mut. Relief Ass'n, 92 Wis. 577, 47 L. R. A. 681, 66 N. W. 697, and Patterson v. Natural

[21] That portion of the opinion which holds that, since the policy was delivered to the insured in Virginia, and there took effect, by its terms, upon his paying the first premium, it was a Virginia contract, governed by the law thereof, and not a contract governed by the laws of Wisconsin, where the defendant company was incorporated is omitted.

Premium Mut. L. Ins. Co., 100 Wis. 118, 42 L. R. A. 253, 69 Am. St. Rep. 899, 75 N. W. 980.[22] * * *

One other contention of respondents remains to be noticed. It is contended that if the McCue estate cannot recover, the innocent parties, his children, will be admitted as claimants. To this contention we repeat what we have said above—the policy is the measure of the rights of everybody under it, and as it does not cover death by the law, there cannot be recovery either by McCue's estate or by his children.

Judgment of the Court of Appeals is reversed, and that of the Circuit Court is affirmed.

[22] The court's discussion of these cases is omitted.

CHAPTER VIII

WAIVER AND ESTOPPEL

SECTION 1.—WAIVER AND ESTOPPEL DISTINGUISHED

REDSTRAKE v. CUMBERLAND MUT. FIRE INS. CO.

(Supreme Court of New Jersey, 1882. 44 N. J. Law, 294.)

On rule to show cause why a new trial should not be granted.

MAGIE, J.[1] * * * The facts developed on the rule were briefly these:[2] * * *

The defendant is a mutual company. The act of incorporation (P. L. 1844, p. 116) provides that each person insured becomes a member of the company. It also gives power to make rules and by-laws for the regulation of the company. The by-laws adopted, and in force during the continuance of this policy, require each policy to contain certain conditions, including that above quoted. They further provide that no alteration or amendment shall be made in the by-laws except by the vote of the directors in a specified mode.

The property insured was located at Salem, where the defendant had an agent, named Hannah. He had died before the trial of this cause. He was accustomed, as such agent, to receive notices of subsequent insurance on property insured by defendant; to receive the policies issued thereon by defendant and transmit them to defendant for the endorsement or acknowledgment required by the condition above quoted; and to deliver to the insured the policies when returned to him from the defendant. This course of conduct in his employment was proved by defendant's officers.

It was further proved by Mitchell, that while owner of the property he procured the additional insurance in question; that he immediately took the policy in suit to Hannah; notified him of the additional insurance just effected; delivered to him the policy in suit for the purpose of the required action of defendant and paid him a fee therefor. He further declared that some two months afterward he called on Hannah for the policy in suit and was informed by him

[1] Part of the opinion, not relating to waiver or estoppel, is omitted.

[2] The policy in suit was issued to one Mitchell, and came to plaintiff by assignment, to which defendant consented. The policy contained a condition requiring the insured to give notice of subsequent insurance within ten days, and to "have the same indorsed in the policy or otherwise acknowledged in writing" by the company.

that he could not find it, but that subsequently Hannah returned it to him, with the declaration "it was all right." Mitchell did not look at the policy, but assumed that it was all right from reliance on Hannah's declaration. In fact, the policy was not endorsed. The assignments were subsequently made and assented to.

Upon these facts the contention of defendant is that Hannah was not such an agent as to be capable of binding the company in this regard by his acts or language; and that his acts and language, if binding on the company, do not justify a recovery in this case, either because they do not amount to a waiver of the condition referred to, or because plaintiff cannot claim a waiver, which is equivalent to an alteration of the company's by-laws in a mode not authorized thereby.[3] * * *

In my view the case presented another ground, entirely conclusive in favor of plaintiff's recovery. By the evidence of Mitchell it appeared that Hannah returned the policy to him after notice of the subsequent insurance, not only without any notification of disapproval on the part of the company, but accompanied the return with the declaration that "it was all right." If Hannah was the general agent of the company this declaration would bind the company. Fire Ins. Co. v. Building Loan Association, supra [43 N. J. Law, 652]. But assuming his powers were limited to communicating to the insured the determination of the company, his declaration, in this regard, was the declaration of the company. If such declaration influenced the conduct of insured and was acted on by him, the defendant will be estopped from denying its truth. The act of the company in expressing its determination was to be performed in one of two ways, viz., either by endorsement on the policy or by some other acknowledgment in writing. If the expression was limited to the endorsement, it might be argued that the return of the policy unendorsed would so contradict the declaration that the estoppel could not arise, because the insured could not, in such case, have acted upon the declaration in good faith. But in Mentz v. Lancaster Ins. Co., 79 Pa. 475, a case where the condition required endorsement of subsequent insurance on the policy, Sharswood, J., held that the declaration of an agent, to whom the policy had been delivered, with notice of the new insurance made on returning the policy, to the effect that the endorsement had been made thereon, when, in fact, it had not been made, estopped the company from objecting to the want of the endorsement. See, also,

[3] Instructions by the trial court adverse to these contentions were approved by the Supreme Court. As to defendant's second contention the trial court had instructed the jury that if notice of the additional insurance was given, and the policy delivered to defendant's agent for the action of the company, and if the company or the agent retained the policy an unreasonable time, that is, longer than necessary to inquire into the condition of the insured property, and either failed to return it, or returned it without a notification of disapproval, they might find a waiver on the part of the company of the condition in question.

Pechner v. Phœnix Ins. Co., 65 N. Y. 195; Pitney v. Glenn's Falls Ins. Co., 65 N. Y. 6. But in the case now in hand, the declaration that the policy was all right, was not necessarily contradicted by the delivery of the policy unendorsed. It was an assertion that the company had approved the additional insurance, if not by endorsement, then by the acknowledgment in writing required.

Upon such an assertion Mitchell evidently acted. He permitted the company to retain the premium note and the cash premium paid. He held and transferred the policy, and his assignees, down to the present claimants, received and held it as a valid and subsisting security against loss by fire. The company also recognized it as an outstanding contract by assenting to each transfer. Under such circumstances the company is estopped from setting up, as a defence, the non-performance of this condition with respect to the acknowledgment required thereby.

Since the jury gave credit to the evidence of Mitchell, which was uncontradicted and properly submitted to them, their verdict should have been for the plaintiff, upon the ground above stated. This seems to render it unnecessary to determine whether the instructions complained of were strictly correct or not. Defendant cannot complain that the jury were permitted to draw an inference from the conduct and silence of the agent, when, upon the same evidence of his conduct and language, they would have been properly instructed to reject the defence insisted on.

It has been strongly urged that plaintiff ought not to be permitted to avail himself of this verdict, because of the provisions and by-laws of the defendant company. Plaintiff, though holding the policy by assignment as collateral security, is affected by any act or default of the insured. State Ins. Co. v. Maackens, 38 N. J. Law, 564. The insured is a member of the company and bound by its rules, of which he is presumed to know. Belleville Mut. Ins. Co. v. Van Winkle, 12 N. J. Eq. 333; Mitchell v. Lycoming Mut. Ins. Co., 51 Pa. 402. The by-laws prescribe this condition for the policies of all its members, and it is contended it cannot be waived in favor of one of them. Besides, the by-laws provide expressly for alteration in a certain mode, and it is further contended that a waiver of this condition is an alteration of the by-laws in an unauthorized mode, of which a member may not take advantage.

If the question were whether an agreement might be made to dispense with the performance of such a condition, I should doubt the existence of any power in the officers or agents to thus alter the fundamental rule of the company. Such is the view taken in Massachusetts, where such conditions and by-laws seem common. Hale v. Mech. Mut. Ins. Co., 6 Gray, 169, 66 Am. Dec. 410; Brewer v. Chelsea Mut. Ins. Co., 14 Gray, 203. In the cases cited the by-laws were appended to the policy and formed part of the contract. It was there held that there was no power in an officer or agent of the company

to waive a condition required by the by-laws, in the face of an express provision for the alteration of the by-laws in a specified mode. This is in accord with the view that no waiver can be claimed from the acts of an agent in the face of an express limitation on his power in that regard. Catoir v. Am. Life Ins. Co., 33 N. J. Law, 487.

In the case in question, the by-laws are not a part of the contract of insurance. But I do not perceive any difference on that account The member of such a company is, in my judgment, debarred from insisting on the validity of a contract with his company, which is different in its form from that prescribed by the rules governing him and his fellow members. So if the insured in this case had given notice of subsequent insurance and demanded the endorsement or acknowledgment of the company, and the officers or the agent had informed him that the company gave a verbal assent and would hold itself bound without the endorsement or acknowledgment in writing, I think it plain the insured could not claim the condition in question was thereby waived or dispensed with, because that would be contrary to the express stipulations of the rules by which he was bound.

But this case presents no such features. There was no agreement to waive, nor assertion that the condition need not be literally performed. On the contrary, the assertion made permitted and justified the inference that the condition had been, in fact, complied with. Such an assertion acted upon presents all the elements of an estoppel and is not a waiver.

Waiver and estoppel are frequently used in reference to insurance policies as if they were synonymous terms. May on Ins. 605, 608; Wood on Ins. 837. Cases plainly of estoppel are treated as presenting questions of waiver. Viele v. Germania Ins. Co., 26 Iowa, 9, 96 Am. Dec. 83; Keenan v. Mo. State Ins. Co., 12 Iowa, 126, 134; Keenan v. Dubuque Mut. Ins. Co., 13 Iowa, 375; Mitchell v. Lycoming Mut. Ins. Co., 51 Pa. 402; Horwitz v. Equitable Mut. Ins. Co., 40 Mo. 557, 93 Am. Dec. 321. In the line of cases followed by the judge below, the failure of the company to notify insured of the refusal to approve the additional insurance, is said to be a waiver of the condition. But it would clearly be more proper to say that the conduct of the company estopped it from asserting what it did not approve.

But in the view taken in this court the question is one of estoppel, and there is no reason why the plaintiff should not avail himself of it, although the insured is a member of the company.

There was another point made in the argument respecting the refusal to admit certain evidence offered by defendant. Letters of the deceased agent to the company were offered to show that he had not, in fact, transmitted to the company the notice of the subsequent insurance which had been given him by Mitchell, and also that he had not transmitted to the company the policy in suit delivered him by Mitchell. These were acts to be performed by Hannah in the line of his duty as defendant's agent, and it will not avail defendant to say that

its own agent failed to perform his duty. Such failure would not excuse defendant, and the evidence, if admitted, would have been of no value.

The rule to show cause ought, therefore, to be discharged.

WELCH v. FIRE ASS'N OF PHILADELPHIA.

(Supreme Court of Wisconsin, 1904. 120 Wis. 456, 98 N. W. 227.)

Action by Anton Welch against the Fire Association of Philadelphia. Judgment for plaintiff, and defendant appeals. Affirmed.

Action to recover on a fire insurance policy. The complaint was in the usual form. The policy was issued April 5, 1902, to run three years. It was in the standard form. The insurance was $500 on plaintiff's house and $200 on his personal property therein. The fire occurred August 12, 1902. Proofs of loss were furnished defendant November 11th thereafter. The amount sought to be recovered is $500. Defendant answered claiming a forfeiture for noncompliance with a condition of the policy requiring proofs of loss to be furnished the company within 60 days after the fire, and further because he had only a leasehold interest in the land upon which his house was located, while the policy expressly provided that it should be of no effect if his title was other than absolute, unless otherwise provided by agreement indorsed upon the policy and added thereto; and that it contained the further provision that no agent or officer or representative of the company should have the power or be deemed to have waived any condition of the policy unless such waiver should be indorsed upon or added to the policy.

The evidence was to the effect that proofs of loss were delivered to defendant as stated in the complaint; that plaintiff's title to the realty was as stated in the answer; that no change in writing was made in the insurance contract from the standard policy; that Fowler, who obtained the policy for plaintiff, was not an agent for defendant except by force of the statute; that, acting in the capacity of a broker, he obtained the policy for plaintiff from Loney & Peckham, defendant's agents; that he delivered it to plaintiff, receiving from him the premium therefor and turning it over to such agents for the benefit of defendant, and that they had such benefit; that at the time of the making of the insurance contract such broker was fully informed as to the nature of plaintiff's title; that he was an insurance agent, and when applied to for a policy was informed as to the nature of plaintiff's title; that thereupon he informed plaintiff that his company would not insure the property, but that he would endeavor to obtain a policy for him in some other company; that Loney & Peckham,

defendant's agents, had no knowledge at the time of the delivery of the policy of the character of defendant's title.[4] * * *

MARSHALL, J. (after stating the facts). A decision in appellant's favor of one or more of these questions would require a reversal: (1) Was the person who procured the policy for respondent, delivered the same to him, received the premium therefor and paid it to appellant through its agents, Loney & Peckham, its general agent under the laws of this state? (2) If he was such agent, so that his knowledge of the true character of respondent's title must be deemed equivalent to knowledge thereof by appellant, can the latter yet defeat his claim because of the forfeiture clause respecting the title to the subject of insurance being other than absolutely vested in him, and the prohibition of any change in the insurance contract by any representative of appellant except by agreement indorsed thereon or added thereto? (3) Did failure to furnish proofs of loss within the time stipulated in the policy terminate appellant's liability?

The first question is covered by the statute (section 1977, Rev. St. 1898). It provides that: "Whoever solicits insurance on behalf of any * * * person desiring insurance of any kind, or transmits an application for or a policy of insurance, other than for himself, to or from any such corporation, or who makes any contract for insurance, or collects any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business of like nature for any insurance corporation, * * * shall be held to be an agent of such corporation to all intents and purposes unless it can be shown that he receives no compensation for such services."

No argument is needed to demonstrate that the acts of Fowler in reference to the policy in question satisfy some one of the circumstances mentioned in the statute, fixing his status, to have been that of a general agent of appellant. It is contended that, as he acted in the capacity of broker, Loney & Peckham being the regular agents of appellant, whatever business he did was either for such agents or for the assured, hence that the statute does not apply. That is clearly ruled otherwise by John R. Davis L. Co. v. Hartford F. Ins. Co., 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131, Schomer v. Hekla F. Ins. Co., 50 Wis. 575, 7 N. W. 544, and other cases, in which it is held that a person who procures a policy of fire insurance for another from the agent of the insurance company issuing the same, acts in a twofold capacity; that of agent for the insured, and, by force of the statute, agent for the insurer; and that his knowledge at the inception of the contract is deemed to be that of the company the same as if he were regularly employed by it as its general agent.

Upon the second question submitted, it appears that, unless the ruling should be different under the standard policy law, then independently thereof it must be conceded that the assurer cannot defeat re-

[4] Part of the statement of facts is omitted.

spondent's claim because of any defect in the title to his property known to Fowler when the contract was made, regardless of the terms of such contract. In Roberts v. Continental Ins. Co., 41 Wis. 321, after citing a long line of decisions in this court, it was said, in effect, that if, when the agent of an insurance company delivers a policy of insurance, he has knowledge of the facts as regards the subject of the insurance inconsistent with the terms of the policy, the assurer, by accepting the premium, is estopped from declaring the policy void because the terms thereof were not so changed in writing as to conform to the facts. There have been many subsequent decisions to the same effect. Renier v. Dwelling House Ins. Co., 74 Wis. 94, 42 N. W. 208; Zell v. Herman F. M. Ins. Co., 75 Wis. 521, 44 N. W. 828; Stanhilber v. Mut. Mill Ins. Co., 76 Wis. 285, 45 N. W. 221; Bourgeois v. Northwestern Nat. Ins. Co., 86 Wis. 606, 57 N. W. 347; Goss v. Agricultural Ins. Co., 92 Wis. 233, 65 N. W. 1036; Schultz v. Caledonian Ins. Co., 94 Wis. 42, 68 N. W. 414; Johnston v. Northwestern Live Stock Ins. Co., 94 Wis. 117, 68 N. W. 868; De Witt v. Home Forum Benefit Order, 95 Wis. 305, 70 N. W. 476; St. Clara Female Academy v. Northwestern Nat. Ins. Co., 98 Wis. 257, 73 N. W. 767; Hobkirk v. Phœnix Ins. Co., 102 Wis. 13, 16, 78 N. W. 160.

These propositions, independently of statutory change, are therein firmly established: (1) Knowledge of an agent of an insurance company at the time of delivering one of its policies, of facts regarding the subject of the insurance inconsistent with the stipulations in the policy in respect thereto, is in legal effect knowledge of the company. (2) A person who delivers the policy and receives the premium, though acting as a broker, is also agent for the company within the foregoing rule by force of the statute. (3) If an insurance company delivers one of its policies and receives the premium therefor with knowledge of facts rendering it void when its terms are applied to such facts, in legal effect it thereby assures its customer that as regards the contract the condition of the property shall be considered in all respects according to the calls of such contract, regardless of the truth of the matter, and invites him to rely thereon; and such invitation being accepted, the company is estopped from thereafter changing its position to the prejudice of the assured, though the policy declares that no condition thereof is subject to waiver except by written agreement indorsed thereon or added thereto. (4) The doctrine of waiver, strictly so called, is not involved in the last foregoing rule. It rests solely on the principle of estoppel in pais,—the principle that one person cannot assume a position in his business relations with another in respect to a transaction of a pecuniary nature upon which such other, acting reasonably, has a right to rely, and after such other has so acted change his position to that other's prejudice and obtain judicial aid to enable him to effectuate his fraudulent purpose.

It is confidently insisted in appellant's behalf that the standard pol-

icy law has changed the foregoing judicial rule, and that this court has so held. There is some warrant therefor, though a careful examination of all the decisions bearing on the subject shows that the court has not committed itself to the extent claimed by counsel. There are three classes of cases to be considered: (1) Those involving policies made after chapter 195, p. 224, Laws 1891, was passed, and when it was supposed to be valid; (2) those decided after such law was condemned as unconstitutional, but wherein it was referred to in a way to indicate that the decisions might have been otherwise had the attempted legislation been effective; (3) decisions made as to policies governed by the present valid policy law.[5] * * *

Straker v. Phenix Ins. Co., 101 Wis. 413, 77 N. W. 752, had to do with a policy issued under the present law, and the effect of knowledge of the agent of acts of the assured during the life of his contract increasing the fire hazard, as regards waiving the condition of the policy rendering the same void in case of any such increase unless permitted by agreement with the company indorsed upon the policy or added thereto. While the standard policy law was referred to as vital to the question in the case and the decision was largely based on what was said in Bourgeois v. Ins. Co., it is apparent that not only was the turning question governed by the law of waiver, strictly so called, but the decision could not have been different had there been no statutory policy law. The court has never held, in the face of a policy provision forfeiting the contract for a violation of its provisions by the assured after the issuance thereof, such provision being accompanied by a stipulation that it shall not be deemed waived other than by a writing indorsed thereon, that a waiver could take place in any other manner. The court has often held to the contrary. Hankins v. Rockford Ins. Co., 70 Wis. 1, 35 N. W. 34; Carey v. German Am. Ins. Co., 84 Wis. 80, 54 N. W. 18, 20 L. R. A. 267, 36 Am. St. Rep. 907; Burr v. German Ins. Co., 84 Wis. 76, 54 N. W. 22, 36 Am. St. Rep. 905; The principle involved, however, has little if any analogy to that of estoppel as applied in Renier v. Dwelling House Ins. Co., and similar cases, though it is true that the term "waiver" has been commonly used in such a way as to indicate to the contrary. In Matthews v. Capital F. Ins. Co., 115 Wis. 272, 91 N. W. 675, a clear distinction was drawn between the two principles. Although it was there said that waiver is commonly applied to acts going to the validity of the contract rather than those in regard to establishing liability thereon after the happening of a loss, it is made clear that the acts going to such validity which were in the mind of the court, were those occurring after the making of the contract and before a loss; not those involved in its inception. It cannot be doubted that, in the absence of any legislative regulation to the contrary, an insurance company may be guilty of such conduct in the making of an in-

[5] In that part of the opinion omitted the cases under classes (1) and (2) are discussed.

surance contract as to estop it from successfully pleading the truth as regards the condition of the subject of the insurance inconsistent with the terms of the policy, to avoid paying a loss to the policy holder occasioned by an injury to or destruction of such subject.

After a careful consideration of the matter we are unable to discover any very good reason for holding that it was intended by the Legislature, in enacting the standard policy law, to abrogate the judicial rule so firmly established, as above indicated. It is quite apparent that the contrary was intended. In the closing paragraph, section 1941—62, Rev. St. 1898, occurs this significant language, following the disability clauses upon which appellant relies as indicating an intention to change the judicial rule: "Up to the time of the delivery of the policy to assured, in all transactions relating to this policy or to the property herein insured, between the assured and any agent of the company, knowledge of the agent shall be knowledge of the company; and in all transactions relating to the subject of insurance, between the insured and any agent of the company after loss, knowledge of the agent shall be knowledge of the company."

It must be presumed that the word "agent" was there used in the same sense as in section 1977. Why was that clause framed so perfectly voicing the foundation principle of the doctrine in Renier v. Ins. Co., and similar cases, if it were [ ] intended to abrogate the judicial rule, as we have termed it, as regards estopping the company by occurrences characterizing the making of the contract, or the further rule in respect to estoppel by conduct of the company acting by its agent after loss, referred to in Matthews v. Capital F. Ins. Co., supra, and well established in the law of insurance, at the time the policy law was enacted? Could there have been any other purpose than to extend to policy holders, by legislative enactment, the same protection they had theretofore enjoyed when the making of their contracts was wholly under the control of the parties thereto? What object was there in embodying the clause under consideration in the law at all if it were not to be treated as an exception to that part immediately preceding it, the disability provisions upon which appellant relies? If the two clauses are not to stand together, the latter being an exception in a sense, to the former, then the latter would seem to be clear surplusage. The latter clause was not in the policy prepared by the insurance commissioner under the law of 1891, which was in part construed by the court in Bourgeois v. Northwestern Nat. Ins. Co., while that part of section 1941—62 preceding it is a verbatim copy of the commissioner's form. That circumstance renders it well-nigh if not decidedly beyond reasonable controversy, that the added language was used to incorporate into the statute, in effect, existing law as found in the decisions of this court.

If we were to entirely overlook the latter part of the standard policy above discussed, and yet give effect to the judicial rule, as in Renier v. Ins. Co., it would not seem to violate the disability clause

thereof on the subject of waiver, since, as we have seen, it does not deal with that subject in any proper sense. Such giving effect works no change in the policy, strictly speaking. It only estops the assurer, by reason of its conduct, from successfully alleging that the situation of the subject of insurance is not as indicated therein. In other words, the rule stands guard over the rights of the policy holder, protecting him from loss by reason of the assurer assuming one attitude with knowledge of all the facts, for the purpose of making a policy contract, and then assuming another and inconsistent attitude to avoid it. If the doctrine is right independently of the standard policy law, it seems that nothing therein on the subject of waiver condemns it, while in connection with such subject, as we have indicated, there seems to have been an attempt made to make such doctrine a part of the statute. It could not be successfully contended that it was the purpose of the Legislature to enable insurance companies to profit by what was regarded at the time of its enactment as a fraud, without some clear, unmistakable language to that effect. Certainly, in the face of plain indications to the contrary, such a contention can find no favor here.

It is well understood that the judicial rule here discussed is peculiar to insurance contracts, and significantly exceptional in that it ignores the familiar principle applied to written obligations generally, that he who becomes a party to such an obligation is presumed to have knowledge of its contents and is bound thereby, unless by some artifice resorted to by the other party thereto, reasonably calculated to prevent or deter him from obtaining such knowledge, he is so prevented or deterred. Bostwick v. Mutual L. Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246. As an original proposition it would be difficult to justify that special favor to policy holders in actions to recover losses sustained. The long line of decisions in this state supporting it, however, precludes any change thereof other than by legislative enactment.

The authorities elsewhere are not all in harmony with it. A very few condemn it. Northern Assur. Co. v. Grand View B. Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, is a significant instance thereof. In that case the departure from general principles is most vigorously condemned in this language: "It is manifest that the theory that such parol evidence, though it may not be competent to change the written contract, may be received for the purpose of raising an estoppel in pais, is a mere invasion of the rule excluding parol testimony when offered to alter a written contract. A party suing on a contract in an action at law must be conclusively presumed to be aware of what the contract contains, and the legal effect of his agreement is that its terms shall be complied with."

The court said further, in effect, the only exception to that is where, by fraud, a person is induced to accept a contract different from the one agreed upon, in excusable ignorance of the variance. The excep-

tion thus condemned has the sanction of some 40 years of our judicial history and of the general run of authorities. Under the circumstances we do not feel warranted in overturning it or seriously questioning the wisdom of it.

The conclusion to which we have arrived is supported by the courts generally where a policy law exists. That is amply shown by citations in the brief of counsel for respondent, and the absence of authorities to the contrary in that of appellant, and our own inability to discover any. In the supporting authorities it appears that there was no judicial hesitation in holding that a policy like ours does not, in letter or in spirit, affect the established rule that an insurance company, barring fraud upon it, participated in by the assured and its agent (Koerts v. Grand Lodge of Wisconsin O. of H. S., 119 Wis. 520, 97 N. W. 163), cannot avoid the effect of the law charging it with knowledge which its agent has at the time of delivering its policy of insurance, respecting the condition of the subject thereof. In all cases, or most of them, waiver is sharply distinguished from estoppel.[6] Forward v. Continental Ins. Co., 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637; Wood v. Am. F. Ins. Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; Robbins v. Springfield F. Ins. Co., 149 N. Y. 477, 44 N. E. 159; Skinner v. Norman, 165 N. Y. 565, 59 N. E. 309, 80 Am. St. Rep. 776; Hadley v. N. H. Fire Ins. Co., 55 N. H. 110; Spalding v. N. H. F. Ins. Co., 71 N. H. 441, 52 Atl. 858; Clawson v. Citizens' Mut. F. Ins. Co., 121 Mich. 591, 80 N. W. 573, 80 Am. St. Rep. 538.

Counsel for appellant cites the Minnesota Supreme Court as holding contrary to the foregoing in Anderson v. Manchester F. Assur. Co., 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 28 L. R. A. 609, 50 Am. St. Rep. 400. We do not so understand that case. Two points were there involved; one being that discussed here, and the other the constitutionality of the standard policy law. Both were at first decided in favor of the company, one justice expressing doubt and favoring a rehearing, and another dissenting particularly on the first point. A reargument was ordered, and on the final disposition of the case the justice who dissented at first wrote the opinion, by which the decision was rested solely on the unconstitutionality of the law. The other point was entirely omitted from the case.

[6] In Oatman v. Bankers' Mut. Fire Relief Ass'n, 66 Or. 388, 134 Pac. 1033 (1913), involving facts strikingly similar to those in the principal case, the court wholly failed to perceive the distinction between waiver and estoppel. The facts clearly showed an estoppel, yet the court decided that "the rules relevant to questions of waiver prior to the enactment of the standard policy law do not apply now." This conclusion was based largely upon Bourgeois v. Northwestern Nat. Ins. Co., 86 Wis. 606, 57 N. W. 347 (1893), which involved an attempted parol executory waiver prior to the issue of the policy, and upon Moore v. Hanover Fire Ins. Co., 141 N. Y. 219, 36 N. E. 191 (1894), and Parker v. Insurance Co., 162 Mass. 479, 39 N. E. 179 (1895), both cases of unauthorized subsequent parol waivers.

For a discussion of the distinction between waiver and estoppel, see article by John S. Ewert in 18 Harvard Law Rev. 364.

Appellant's last point is ruled in favor of respondent by Flatley v. Phenix Ins. Co., 95 Wis. 618, 70 N. W. 828. That is in accordance with the general rule laid down in the text-books and supported by an abundance of authority, that a requirement in a policy of insurance as regards furnishing the proofs of loss within a specified time, not coupled with any provision making failure to comply therewith a cause of forfeiture, at the most only affects the maturity of the claim. Joyce on Ins. § 3282. That was the doctrine of this court when the standard policy law was framed, and in harmony therewith no forfeiture clause was incorporated therein in connection with the requirement for proofs of loss, but this language was so incorporated: "The loss shall become payable sixty days after notice and proofs of loss herein required have been received by this company." Section 1941—57, Rev. St. 1898.

The fundamental principle involved is that forfeitures are not favored and will be held not to have been intended, in the absence of language clearly indicating the contrary. That applies as well to a law as to a contract. So, though in Flatley v. Ins. Co., the question was raised as regards a contract which at its inception was wholly under the control of the parties thereto, it having been issued before we had a valued policy law, it applies just as strongly in this case. Moreover, the doctrine of the court, as indicated, was in effect incorporated into the policy.

The judgment is affirmed.[7]

BENNETT v. UNION CENT. LIFE INS. CO.

(Supreme Court of Illinois, 1903. 203 Ill. 439, 67 N. E. 971.)

The plaintiff brought an action against the defendant company to recover on a policy of insurance issued by the defendant company, June 28, 1898, on the life of Fernando W. Bennett. In a special plea the defendant company set forth that at the issuance of the policy the insured executed to the defendant four promissory notes, payable on

[7] "The principal contention of the appellant's counsel under this head seems to be that the evidence offered to show estoppel was not within the issues, because the plaintiff had brought suit upon the Wisconsin Standard policy, and to allow the proof would be to nullify the condition and practically eliminate it from the policy. The argument is ingenious, but unsound. It is admitted that the policy sued upon was the Standard policy as alleged in the complaint, but that the condition referred to was rendered inoperative by knowledge on the part of the defendant before issuance of the first policy of the fact that plaintiff was not the owner of the ground in fee. The undisputed evidence shows that the defendant had knowledge that plaintiff did not own the land upon which the insured building stood, and issued the first policy and received and retained the premium with such knowledge. This, upon well settled principles, estopped the defendant from declaring the policy void, or changing its position, to the prejudice of the plaintiff. Welch v. Fire Ass'n, etc., 120 Wis. 456, 98 N. W. 227 (1904)." Kerwin, J., in Farley v. Spring Garden Ins. Co., 148 Wis. 622, 134 N. W. 1054 (1912).

September 30 and December 30, 1898, and on March 30 and June 30, 1899, for the amount of the first premium. Three of the notes contained the stipulation: "Said policy, including all conditions herein for surrender or continuance as a paid-up policy, shall, without notice to any parties interested therein, be null and void on the failure to pay this note at maturity, with interest payable annually. In case this note is not paid at maturity, the full amount of premium shall be considered earned as premium during its currency, and the note payable without reviving the policy or any of its provisions."

The policy provided: "The failure to pay, if living, any of the first three annual premiums, or the failure to pay any notes or interest upon notes given to the company for any premium, on or before the days upon which they become due, shall avoid and nullify this policy, without action on the part of the company or notice to the insured or beneficiary; and all payments made upon this policy shall be deemed earned as premiums during its currency. Any and all notes, with their conditions, which may be given for premiums or loans upon the security of this policy, are hereby made a part of this contract of insurance."

It was further alleged that the said notes had not been paid. To this plea the plaintiff filed a replication, the substance of which is given in the opinion of the court. The defendant entered a demurrer, which was sustained by the trial court, and the plaintiff appealed. From a judgment of the appellate court, affirming that of the trial court, the plaintiff appeals to the supreme court.

Boggs, J.[8] * * * The substance of the replication under consideration is that the assured was the owner of and entitled to a portion of the proceeds of a judgment which had been rendered in favor of Adolph Grunow and against the Chicago Tire & Spring Company, which judgment was in the hands of one C. M. Hardy for collection for the benefit of the assured and the other owners thereof; that the appellee company, after the cause of forfeiture had fully accrued, and during the lifetime of the assured, agreed with the assured that if he would secure to the company the payment of the interest which the assured held in the said judgment it would extend the time of the payment of the four notes which he had given for the premiums on the policy on his life until the said judgment should be collected, and that the assured accepted such offer and executed an order in writing, directing and authorizing the said Hardy to pay to the appellee company the full amount of the said notes out of any moneys collected by the said Hardy for the assured from the said judgment debtor, and procured such order to be accepted by said Hardy, and delivered the order, so accepted, to the appellee company, and that the appellee company accepted the same, and held and retained the said order dur-

[8] The statement of facts as given in the opinion of the court is much abbreviated, and a portion of the opinion dealing with a question of pleading is omitted.

ing the remainder of the lifetime of the assured; that on the 19th day of March, 1901, which was after the death of the assured, but before either of the two latter notes of the assured fell due, the said Hardy collected the judgment, and on the same day, and out of the moneys so collected, tendered to the appellee company the full amount of the four notes held by it against the assured. The demurrer admitted these averments to be true. If true, it is manifest the appellee company could not accept and hold the order on Hardy, and thus secure to itself the benefit of the contract during the lifetime of the assured, for the security of the amounts due on the past-due and also the unmatured notes, and be allowed to repudiate the agreement in the event of his death.

The argument of counsel that the agreement was without consideration cannot avail. Without conceding a legal and valuable consideration is an essential basis of a waiver, we find such consideration here present. By the terms of the contract the appellee company obtained the transfer to it of the interest of the assured in the judgment as collateral security for the amount of the four notes—the two that were past due and the two that were unmatured. Prior to the making of the contract set forth in the replication, and the execution by the assured of the order to Hardy, and its acceptance, the appellee company had but the individual notes of the assured, without any security for their payment. Conceding, as claimed by counsel, it had the right to avoid liability on the policy and collect the amount earned as premiums, still the replication disclosed that the company preferred to obtain security for the payment of all the notes and to remain liable upon the policy of insurance, and that the assured provided satisfactory security by means of the transfer of his interest in the judgment against the Chicago Tire & Spring Company. The right to enforce a forfeiture is for the benefit of the appellee company. It is not the policy of the law to favor a forfeiture, but it is strictly in accord with legal principles to hold that it shall be deemed waived or abandoned by acts which recognize the continued validity of the policy. If the averments of this replication can be supported by proofs, it is clear the defense sought to be made by the special plea would be fully precluded.

The policy contained a clause providing that "none of its terms can be modified, nor any forfeiture under it waived, save by an agreement in writing, signed by the president, vice president, secretary, or assistant secretary of the company, whose authority for this purpose shall not be delegated." There is no attempt here to vary the terms of the written agreement by parol proof, but only to show that the appellee company, subsequent to the issuance of the policy and to the cause of forfeiture thereof, entered into a parol agreement, the legal consequence of which was to estop it from availing itself of a ground of forfeiture. The clause in the policy has relation only to express agreements to waive a forfeiture. The replication does not rely upon any

such express agreement. It sets forth a contract, entered into by the company, which it was within its power to make, and from which the law declares a waiver or estoppel, not because of any express agreement to waive any provision of the policy, but as the legal consequence of the contract entered into by the appellee company. If the averments of the replication are true, it would be highly unjust and indefensible, upon any ground of right or good morals, to permit the company to avoid liability on the ground the policy had been forfeited before it entered into the contract set forth in the replication. The contract, and the rights, duties, and obligations of the parties under it, are inconsistent with the right of the appellee company to insist upon a forfeiture, and the law therefore declares a waiver, not because the appellee company has by any of its officers, either verbally or in writing, agreed that the forfeiture should be waived, but because the law declares it waived by the acts and conduct of the appellee company, and without regard to whether it intended to expressly agree to a waiver. By the contract set forth in the replication the appellee company sought to secure the payment of premiums not yet accrued or earned by it, and as a consequence the law regards the policy as existing, and the right to declare a forfeiture waived for that reason. The waiver to be here enforced is of the class known to the law as "implied waivers," to which reference is made in Schimp v. Cedar Rapids Ins. Co., 124 Ill. 354, 16 N. E. 229, and it is founded, not upon any express agreement to waive the ground of forfeiture, but, as was said in the case cited, upon the doctrine that a party cannot be heard to say his contract "is valid for one purpose, and, in the same breath, that it is invalid for all other purposes," and upon "the general principles of common honesty and natural justice which the law exacts of mankind in their intercourse and dealings with one another." [9]

[9] The important distinction between waiver and estoppel, so often overlooked by the courts, is well stated by Candler, J., in Johnson v. Ætna Ins. Co., 123 Ga. 404, 51 S. E. 339, 107 Am. St. Rep. 92 (1905): "An insurance company receives an application for a policy. One of the rules of the company is that insurance will not be issued upon a building situated on land not owned by the applicant. But the company, through its agent, knows that the applicant owns the building which he wishes to have insured, but does not own the land on which it is situated, and, with this knowledge, nevertheless issues a policy on the building. Certainly, after leading the applicant to believe that he would be protected, and receiving from him the premiums charged for the insurance, it should not, in good conscience, be heard to set up in defense to an action on the policy that the ownership of the building and of the land was in different persons. True, the policy states on its face that no agent has the power to waive any of the conditions of the policy, and that none of them will be deemed to have been waived unless such waiver is attached to or indorsed upon the policy in writing. But this is not a question of waiver so much as of notice and estoppel. The agent's knowledge, as has been seen, is the company's knowledge. In spite of the assertion in the policy that the contract shall be void if the ownership of the property is of a given character, the policy has been issued with notice to the company that the ownership is of that character. Regardless of any question of waiver, then, the company has placed itself in a position where

It was error to sustain the demurrer to the replication under consideration, and for that error the judgment of the trial court and that of the Appellate Court must be and are each reversed. The cause will be remanded to the trial court, with directions to overrule the demurrer and to take such further proceedings in the cause as to law and justice may appertain. Reversed and remanded.

SECTION 2.—PAROL WAIVER PRIOR TO ISSUE OF POLICY

INSURANCE CO. v. MOWRY.

(Supreme Court of the United States, 1877. 96 U. S. 544, 24 L. Ed. 674.)

Error to the Circuit Court of the United States for the District of Rhode Island.

In the trial court there was a verdict for the plaintiff; and, judgment having been rendered thereon, the defendant sued out this writ of error.

Mr. Justice FIELD delivered the opinion of the court:

This was an action on a policy of insurance, issued by the Union Mutual Life Insurance Company, a corporation created under the laws of Maine, upon the life of Nelson H. Mowry, for the sum of $10,000. The insurance was effected by a nephew of the insured, for his sole benefit. The nephew was at the time a creditor of the insured to the extent of $6,000, and had agreed to embark with him in an enterprise requiring the expenditure of considerable capital, and depending for its success upon the knowledge and skill of the insured in business. These circumstances gave the nephew such an interest in the life of the insured as to prevent the policy from being a wager one. The insurance effected was from the 9th of March, 1867, and the policy recited the payment of the first annual premium on that day, and stipulated for the payment of the subsequent pre-

it would be inequitable to allow it to make the defense which it seeks. 'Waiver is sometimes the express abandonment of a right. More frequently it is implied from acts that are inconsistent with its continued assertion. * * * Estoppel is the shield of justice interposed for the protection of those who have not been wise or strong enough to protect themselves. It is the special grace of the court, authorized and permitted to preserve equities that would otherwise be sacrificed to cunning and fraud.' Ostrander, Fire Ins. § 366. As to matters arising subsequently to the issuance of the policy the case wears a different aspect. The contract is then made, and both parties are on notice as to its terms. The insured is bound to know what are the rights of the company, and that none of them can be relinquished save in the manner pointed out in the policy; and he, on his part, will not be heard to urge a waiver by the company unless it has been made in the manner required."

miums on the same day of that month each year. The payment of the insurance money, after notice and proof of the death of the insured, was made dependent upon the punctual payment, each year, of the premium. The policy, in terms, declared that it was made and accepted by the insured and the nephew, upon the express condition that if the amount of any annual premium was not fully paid on the day and in the manner provided, the policy should be "null and void, and wholly forfeited." And it declared that no agent of the company, except the president and secretary, could waive such forfeiture, or alter that or any other condition of the policy.

The second premium, due on the 9th of March, 1868, was not paid, and the insured died on the 8th of April following. Forty-five days after it was due, and fifteen days after the death of the insured, this premium was tendered to the company, and was refused. The question for determination is, whether a tender of the premium at that time was sufficient to hold the company to the payment of the insurance money.

By the express condition of the policy, the liability of the company was released upon the failure of the insured to pay the premium when it matured; and the plaintiff could not recover, unless the force of this condition could in some way be overcome. He sought to overcome it, by showing that the agent, who induced him to apply for the policy, represented to him, in answer to suggestions that he might not be informed when to pay the premiums, that the company would notify him in season to pay them, and that he need not give himself any uneasiness on that subject; that no such notification was given to him before the maturity of the second premium, and for that reason he did not pay it at the time required. This representation before the policy was issued, it was contended in the court below, and in this court, constituted an estoppel upon the company against insisting upon the forfeiture of the policy.

But to this position there is an obvious and complete answer. All previous verbal arrangements were merged in the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premium to be paid, was there expressed, for the very purpose of avoiding any controversy or question respecting them. The entire engagement of the parties, with all the conditions upon which its fulfilment could be claimed, must be conclusively presumed to be there stated. If, by inadvertence or mistake, provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company.

The previous representation of the agent could in no respect operate as an estoppel against the company. Apart from the circumstance

that the policy subsequently issued alone expressed its contract, an estoppel from the representations of a party can seldom arise, except where the representation relates to a matter of fact,—to a present or past state of things. If the representation relate to something to be afterwards brought into existence, it will amount only to a declaration of intention or of opinion, liable to modification or abandonment upon a change of circumstances of which neither party can have any certain knowledge. The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made.

The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect, if a party who, by his statement as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment. But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. The doctrine carried to the extent for which the assured contends in this case would subvert the salutary rule, that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent. White v. Ashton, 51 N. Y. 280; Bigelow, Estoppel, 437–441; White v. Walker, 31 Ill. 422; Faxton v. Faxon, 28 Mich. 159.

The learned judge who tried this case in the Circuit Court instructed the jury, in substance, that if they could find from the language of the agent that there was an agreement between him and the assured, made before the policy was executed, that the latter should have notice before he should be required to pay the annual premium, then that the company, not having given such notice, was estopped from setting up the forfeiture stipulated by the policy for non-payment of the premium when due. For the reasons we have stated, we think the court erred in this instruction.

There is nothing in the record which shows that the agent was invested with authority to make an insurance for the company. In representing himself as an agent, he only solicited an application by the assured to the company for a policy. That instrument was to be

drawn and issued by the company, and it shows on its face that the authority to the agent was limited to countersigning it before delivery and to receiving the premiums. But even if the agent had possessed authority to make an insurance for the company, and he made the agreement pretended, still the assured was bound by the terms of the policy subsequently executed and accepted by him.

The judgment must be reversed, and the cause remanded for a new trial; and it is so ordered.[10]

[10] See, in accord, Metropolitan Life Ins. Co. v. Hall, 104 Va. 572, 52 S. E. 345 (1905). Under the principle governing the Mowry Case, prospectuses and circulars published by an insurance company cannot be introduced in evidence for the purpose of preventing, by way of waiver or estoppel, a forfeiture under the terms of a policy subsequently issued. See Ruse v. Insurance Co., 23 N. Y. 516 (1861). Contra: Southern Mut. Life Ins. Co. v. Montague, 84 Ky. 653, 2 S. W. 443, 4 Am. St. Rep. 218 (1887); Wood v. Dwarris, 11 Exch. (Hurl. & G.) 493 (1856).

So parol evidence is not admissible to show a custom of miners to store powder in their houses, in order to validate a policy containing a condition declaring it void if powder should be stored in the building insured. Penman v. St. Paul Ins. Co., 216 U. S. 311, 30 Sup. Ct. 312, 54 L. Ed. 493 (1910). But the principle of this case does not apply when the property specifically insured necessarily includes or involves the presence of articles prohibited in the printed conditions of the policy. See McClure v. Mutual Fire Ins. Co., 242 Pa. 59, 88 Atl. 921, 48 L. R. A. (N. S.) 1221 (1913), in which it is said: "The weight of authority is to the effect that the use of an article prohibited by the printed clauses of the policy will not avoid it, if the prohibited article is a customary component part of the goods insured, or is in customary use in carrying on the trade or business conducted in the insured building. Where there is an inconsistency between the written and printed portions of the policy, the former must control, and this means that, if there are printed prohibitions against keeping certain articles on the insured premises, the policy will not be avoided by a violation of these provisions, if the prohibited articles are a part of the general stock of merchandise intended to be insured." Also in accord is Maril v. Connecticut Fire Ins. Co., 95 Ga. 604, 23 S. E. 463, 30 L. R. A. 835, 51 Am. St. Rep. 102 (1895).

In Pfiester v. Missouri State Life Ins. Co., 85 Kan. 97, 116 Pac. 245 (1911), parol testimony was admitted to show a prior parol agreement as to the time for the payment of premiums, in contradiction of the terms of the policy. This conclusion was reached on the theory that the complaint asked for reformation of the contract. See this case as reported herein, post, p. 552.

SECTION 3.—WAIVER SUBSEQUENT TO ISSUE OF POLICY

INSURANCE CO. v. NORTON.

(Supreme Court of the United States, 1877. 96 U. S. 234, 24 L. Ed. 689.)

Error to the Circuit Court of the United States for the Northern District of Illinois.

This action was brought by Phoebe A. Norton on a policy of insurance, issued by the Knickerbocker Life Insurance Company of New York, on the life of Jesse O. Norton, for the benefit of his wife and children. The original policy was dated April 20, 1867; and, being partly destroyed by fire, was reissued in April, 1874. The premium was $385, payable annually on the twentieth day of April in each year; and the policy, amongst other things, contained the following conditions:

"Second. If the said premium shall not be paid on or before twelve o'clock, noon, on the day or days above mentioned for the payment thereof, at the office of the company in the city of New York (unless otherwise expressly agreed in writing), or to agents when they produce receipts signed by the president or secretary, or if the principal of or interest upon any note or other obligation given for the premium upon said policy shall not be paid at the time the same shall become due and payable, then, and in every such case, the company shall not be liable to pay the sum assured, or any part thereof; and said policy shall cease and be null and void, without notice to any party or parties interested herein, except that the stipulation for a new policy, as hereinbefore provided, shall remain in force.

"Third. In case a loan of or credit for a portion of said premium shall be made on this policy, said policy shall be subject to all of the terms and conditions expressed in the acknowledgment or obligation given for such loan or credit, and to the payment of interest thereon in advance; and said loan or credit shall be a just counterclaim against any amount which shall become due and payable on the policy, and shall be deducted therefrom."

By an indorsement on the policy, it was declared that "agents of the company are not authorized to make, alter, or abrogate contracts, or waive forfeitures."

The insured died on the 3d of August, 1875; and the company refused to pay the insurance, on the ground that the policy was forfeited by reason of the non-payment of certain notes given for the last premium, which was due April 20, 1875. It was conceded that all the other premiums had been paid.

The declaration, besides a special count on the policy, contained the ordinary money counts. The defendant pleaded the general issue, and, specially, that the premium notes were not paid at maturity, and that the policy thereby became forfeited. The plaintiff replied, first, that the agent of the defendant at Chicago, regularly authorized by the defendant so to do, extended the time of payment of the first note, which became due on the 20th of June, to the 20th of July, when she tendered the amount thereof to the agent, who refused to receive the same; and that she also tendered the amount of the second note at its maturity, which was likewise refused: secondly, that, after the maturity of the first note, the agent of the defendant, regularly authorized so to do, waived all advantages the company might have claimed because of its non-payment at maturity, and extended the time of payment, as before stated, with an averment of tender and refusal. The defendant, by way of rejoinder, denied that it had extended the time of payment, or that it had waived any advantages, as alleged. This was the issue at the trial.

It appeared on the trial that the premium in question was settled by the payment of $50 in cash, and the balance in two promissory notes given by Jesse O. Norton to the insurance company, payable respectively in two and three months, and maturing, one on the 20th of June, the other on the 20th of July, 1875. Each note contained a clause, declaring that if it were not paid at maturity the policy would be void,—this being the usual form of premium notes.

On the issue as to extension of time on the notes, and the authority of the agent to grant it, the plaintiff produced three witnesses: Randall, agent of the company down to March, 1874; Frary, his successor, who was agent at the time in question; and Martin Norton, son of the insured, who acted in behalf of his father in reference to the alleged extension, and to the tender of payment.

The testimony of these witnesses tended to show that formerly the company had allowed their agent to extend time on premium notes for a period of ninety days; that this indulgence was afterwards reduced to sixty days, and then to thirty; and that, at the period in question, the agent was required, as a general thing, to return the notes in his hands if not paid by the 15th of the month following that in which they became due.

As to what took place with reference to the notes in question, there is some conflict in testimony between Martin Norton and the agent, Frary. The former testified, in substance, that he called on the agent, in behalf of his father, in June, 1875, a few days after the first note became due, and told him that his father wished it extended for thirty days; to which the agent agreed,—his answer being, "All right." That he called again on or about the 8th of July, to request an extension of the other note, which would become due on the 20th of that month, and a further extension of the first note to the 10th of Au-

gust. That the agent said he would have to write to the company about this. That, on the 13th, he called again, and told the agent that his father had concluded to pay both notes; and the agent gave him the figures, showing what was due on them. That he called again on the 15th, prepared to pay the notes, when he was informed by the agent that he could not receive the money, having received orders from the company to return all the papers to New York, and he had done so. That he then made a legal tender of the amount due on the first note, which was refused. Frary testified that he had no recollection of the first interview, or of agreeing to extend the first note. As to the rest, they did not materially differ.

In addition to the testimony relating to the general practice of the agents in granting extensions of time for the payment of premium notes, evidence was given tending to show that Norton, the insured, had usually received more or less indulgence of that kind.

The counsel for the defendant moved to strike out the testimony touching the usages of the company as to non-payment of prior premium notes by Norton, and prior indulgence thereon to him, as incompetent, and in conflict with the terms of the policy, and as showing no authority in Frary to give the alleged extension; which was without consideration, if made, and after the forfeiture had occurred.

The counsel for the defendant also moved to strike out that portion of Martin Norton's testimony relative to an agreement for an extension of the premium notes, such agreement being without authority on the part of the agent, &c. The court overruled the latter motion; and, as to the first, directed the jury to disregard so much of Randall's testimony as tended to show the conduct of the defendant and plaintiff in regard to former payments; but allowed to stand so much of Randall's and Frary's testimony as tended to show the powers of the agents in reference to giving extensions on premiums or premium notes. This ruling was excepted to.

In charging the jury, the court left it to them to say, from the evidence, whether the agent of the defendant had power to waive a strict compliance with the terms of the agreement as to the time of paying the notes given for the premium; and, if he had such power, whether such a waiver was in fact made: if it was, and if the insured offered to pay the notes within the time to which they were extended, and the company refused to receive payment, that then the plaintiff was entitled to recover. The jury were further instructed that the power vested in Randall, the previous agent, was only pertinent as it tended to throw light on the powers vested in his successor, Frary. The defendant's counsel excepted to the charge, and submitted several instructions, the purport of them being, in substance, that, in view of the express provisions of the policy, the evidence was utterly irrelevant and incompetent to show any authority in the agent to grant any indulgence as to the time of paying the notes, and to waive the forfeiture incurred by their non-payment at maturity; or to show that

any valid and legal extension was, in fact, granted, or that the forfeiture of the policy was waived.

These instructions were refused. There was a judgment for the plaintiff, whereupon the company sued out this writ of error.

Mr. Justice BRADLEY, after stating the case, delivered the opinion of the court:

The material question in this case is, whether, in view of the express provisions of the policy, the evidence introduced by the assured was relevant and competent to show that the company had authorized its agent to grant indulgence as to the time of paying the premium notes, and waive the forfeiture incurred by their non-payment at maturity; or to show that any valid extension had, in fact, been granted, or the forfeiture of the policy waived.

The written agreement of the parties, as embodied in the policy and the indorsement thereon, as well as in the notes and the receipt given therefor, was undoubtedly to the express purport that a failure to pay the notes at maturity would incur a forfeiture of the policy. It also contained an express declaration that the agents of the company were not authorized to make, alter, or abrogate contracts or waive forfeitures. And these terms, had the company so chosen, it could have insisted on.[11] But a party always has the option to waive a condition or stipulation made in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it. It was not bound to act upon the declaration that its agents had no power to make agreements or waive forfeitures; but might, at any time, at its option, give them such power. The declaration was only tantamount to a notice to the assured, which the company could waive and disregard at pleasure. In either case, both with regard to the forfeiture and to the powers of its agent, a waiver of the stipulation or notice would not be repugnant to the written agreement, because it would only be the exercise of an option which the agreement left in it. And whether it did exercise such option or not was a fact provable by parol evidence, as well as by writing, for the obvious reason that it could be done without writing.

That it did authorize its agents to take notes, instead of money, for premiums, is perfectly evident, from its constant practice of receiving such notes when taken by them. That it authorized them to grant indulgence on these notes, if the evidence is to be believed, is also apparent from like practice. It acquiesced in and ratified their acts in this behalf. For a long period, it allowed them to give an indulgence

[11] It has frequently been so held. See Carey v. Insurance Co. (1893) 84 Wis. 80, 54 N. W. 18, 20 L. R. A. 267, 36 Am. St. Rep. 907 (unauthorized oral waiver by agent of change of possession); Black v. Atlantic Home Ins. Co. (1908) 148 N. C. 169, 61 S. E. 672, 21 L. R. A. (N. S.) 578 (oral consent given for additional insurance by local agent without authority); McElroy v. Metropolitan Life Ins. Co. (1909) 84 Neb. 866, 122 N. W. 27, 23 L. R. A. (N. S.) 968, 19 Ann. Cas. 28 (time for payment of premiums extended orally by local agent contrary to the terms of the policy).

of ninety days; after that, of sixty; then of thirty days. It is in vain to contend that it gave them no authority to do this, when it constantly allowed them to exercise such authority, and always ratified their acts, notwithstanding the language of the written instruments.

We think, therefore, that there was no error committed by the court below in admitting evidence as to the practice of the company in allowing its agents to extend the time for payment of premiums and of notes given for premiums, as indicative of the power given to those agents; nor any error in submitting it to the jury, upon such evidence, to find whether the defendant had or had not authorized its agent to make such extensions; nor in submitting it to them to say whether, if such authority had been given, an extension was made in this case.

Much stress, however, is laid on the fact that the extension claimed to have been given in this case was not given, or applied for, until after the first note became due and the forfeiture had been actually incurred. But we do not deem this to be material. The evidence does not show that any distinction was made in granting extensions before or after the maturity of the notes. The material question is, whether the forfeiture was waived; and we see no reason why this may not be done as well by an agreement made for extending the note after its maturity, as by one made before. In either case, the legal effect of the indulgence is this: the company say to the insured, Pay your note by such a time, and your policy shall not be forfeited. If the insured agrees to do this, and does it, or tenders himself ready to do it, the forfeiture ought not to be exacted. In both cases, the parties mutually act upon the hypothesis of the continued existence of the policy. It is true, if the agreement be made before the note matures and before the forfeiture is incurred, it would be a fraud upon the assured to attempt to enforce the forfeiture, when, relying on the agreement, he permits the original day of payment to pass. On the other hand, if the agreement be made after the note matures, such agreement is itself a recognition, on the company's part, of the continued existence of the policy, and, consequently, of its election to waive the forfeiture. It is conceded that the acceptance of payment has this effect; and we do not see why an agreement to accept, and a tender of payment according to the agreement, should not have the same effect. Both are acts equally demonstrative of the election of the company to waive the forfeiture of the policy. Grant that the promise to extend the note is without consideration, and not binding on the company,—which is perhaps true as well when the promise is made before maturity as when it is made afterwards,—still it does not take from the company's act the legitimate effects of such act upon the forfeiture of the policy. Perhaps the note might be sued on in disregard of the extension; but if it could be, that would not annihilate the fact that the company elected to waive the forfeiture by entering into the transaction. If it should repudiate its agreement, it could not repudiate the

waiver of the forfeiture, without at least giving to the assured reasonable notice to pay the money.

Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And, where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made. It is true, we held in Statham's Case (93 U. S. 24), that, in life insurance, time of payment is material, and cannot be extended by the courts against the assent of the company. But where such assent is given, the courts should be liberal in construing the transaction in favor of avoiding a forfeiture.

The case of leases is not without analogy to the present. It is familiar law, that, when a lease has become forfeited, any act of the landlord indicating a recognition of its continuance, such as distraining for rent, or accepting rent which accrued after the forfeiture, is deemed a waiver of the condition.[12] * * *

These cases show the readiness with which courts seize hold of any circumstances that indicate an election or intent to waive a forfeiture. We think that the present case is within the reason of these authorities; and that the objection, that the note was already past due when the agreement to extend it was made, is not sufficient to prevent said agreement from operating as a waiver of the forfeiture.

Several minor points were raised by the defendant; but they are all either substantially embraced in the main points already considered or are not of sufficient force to require special discussion.

We find no error in the record, and the judgment of the Circuit Court is affirmed.[13]

[12] The court here discusses at some length the cases of Doe v. Meux, 4 Barn. & Cress. 606 (1825), Doe v. Birch, 1 M. & W. 402 (1836), and Ward v. Day, 4 Best & Smith, 337 (1863).

[13] There is abundant authority to the effect that waivers of conditions in a policy, made subsequent to the inception thereof, may be shown by parol, without doing violence to the parol evidence rule. See Union Central Life Ins. Co. v. Hook, 62 Ohio St. 256, 56 N. E. 906 (1900); Carrigan v. Lycoming Fire Ins. Co., 53 Vt. 418, 38 Am. Rep. 687 (1881); Wilson v. Conway Fire Ins. Co., 4 R. I. 141 (1856); Riley v. American Central Ins. Co., 117 Mo. App. 229, 92 S. W. 1147 (1906); Hartford Life Ins. Co. v. Unsell, 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496 (1892); Hastings v. Brooklyn Life Ins. Co., 138 N. Y. 473, 34 N. E. 289 (1893); Graham v. Security Mut. Life Ins. Co., 72 N. J. Law, 298, 62 Atl. 681 (1905).

"The conditions mentioned in the policy could, of course, be waived by the company, either before or after they were broken; they were inserted for its benefit, and it depended upon its pleasure whether they should be enforced. The difficulty in this case, and in nearly all cases where a waiver is alleged in the absence of written proof of the fact, arises from a consideration of the effect to be given to the acts of agents of the company in their dealings with the assured. Of course, such agents, if they bind the company, must have authority to waive a compliance with the conditions upon the breach of which the forfeiture is claimed, or to waive the forfeiture when incurred, or their acts waiving such compliance or forfeiture must be subsequently approved by the company. The law of agency is the same, whether it be applied to the act of an agent undertaking to continue a policy of insurance or to any other act for which his principal is sought to be held

Mr. Justice SWAYNE, Mr. Justice FIELD, and Mr. Justice STRONG dissented.

Mr. Justice STRONG. I dissent from the judgment given in this case. The insurance effected by the policy became forfeited by the non-payment ad diem of the premium note. The policy then ceased to be a binding contract. It was so expressly stipulated in the instrument. Admitting that the company could afterwards elect to treat the policy as still in force, or, in other words, could waive the forfeiture, the local agent could not, unless he was so authorized by his principals. The policy declared that agents should not have authority to make such waivers. And there is no evidence in this case that the company gave to the agent parol authority to waive a forfeiture after it had occurred. They had ratified his acts extending the time of payment of premium notes, when the extension was made before the notes fell due. But no practice of the company sanctioned any act of its agent done after a policy had expired, by which new life was given to a dead contract.

responsible. * * * The company, notwithstanding the provision in the policy that its agents were not authorized to waive the forfeitures, sent to them renewal receipts signed by its secretary, to be used when countersigned by its local manager and cashier, leaving their use subject entirely to the judgment of the local agent. The propriety of their use, in the absence of any fraud in the matter, could not afterwards be questioned by the company. * * * So far, then, as the waiver of the forfeiture incurred for nonpayment of the premiums is concerned, it is clear that the company, by its course of dealing, had, notwithstanding the provision of the policy, left the matter to be determined by its local agent, to whom the renewal receipts were intrusted." Field, J., in Globe Mut. Ins. Co. v. Wolff, 95 U. S. 326, 24 L. Ed. 387 (1877).

UNAUTHORIZED SUBSEQUENT WAIVERS.—It is manifest that unless the act of the agent in waiving a condition of the policy is authorized expressly or impliedly, as in the principal case, such waiver cannot be binding upon the insurer. Thus in Baumgartel v. Providence Washington Ins. Co., 136 N. Y. 547, 32 N. E. 990 (1893), where defendant had issued to plaintiff a policy of fire insurance which contained a clause to the effect that, unless otherwise provided by agreement indorsed thereon, it should be void in case of other insurance on the property insured, and it also provided that no agent of the company should have power to waive any provision or condition of the policy except such as by its terms might be the subject of agreement indorsed thereon or added thereto, and, as to those, that he should have no such power nor be deemed to have waived them unless in writing so indorsed or attached, and where, in an action upon the policy, it appeared that, during its life, the plaintiff, without notice to the defendant and without its knowledge or consent, obtained other insurance upon the property, and that thereafter he informed the agent, who had issued the policy, of this fact, and that the agent had replied, "All right; I will attend to it," but it did not appear that the plaintiff then had the policy in suit with him, or afterwards applied to said agent for written consent to the other insurance, it was held that knowledge of the agent of the subsequent insurance did not satisfy the condition of the policy, and that plaintiff having failed to comply therewith, the policy was forfeited and void, and also held that the statements of defendant's agent did not amount to a waiver of the conditions or authorize the application of the doctrine of estoppel. It was said in the opinion: "The stipulation with respect to further insurance is one of the conditions upon which, by the agreement of the parties, the liability of the defendant depended in case of a loss during the term of the insurance. The parties have also agreed upon the mode in which the condition could be complied with or

LIVERPOOL & LONDON & GLOBE INS. CO. v. SHEFFY.

(Supreme Court of Mississippi, 1894. 71 Miss. 919, 16 South. 307.)

Action by J. K. Sheffy against the Liverpool & London & Globe Insurance Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

WOODS, J. Two questions are presented by this appeal, viz.: First, did the insured forfeit his right to a recovery on the policy sued on by reason of his procurement of subsequent and additional insurance without having the consent of the appellant indorsed in writing on its prior policy? And, second, has the insured forfeited his right to recovery on the policy issued by appellant by a violation of what is known as the "iron-safe clause," contained in the contract of insurance?[14] We shall not enter upon any discussion of the disputed facts. The jury has found these issues for the appellee, and we are satisfied with that finding. The fact that the subsequent insurance in the Orient Company was brought to the attention of the appellant's agent, with whom alone the insured dealt at all times, and the other fact that request was made of this agent that he indorse the appellant's consent to this additional insurance in writing on the policy sued on, and the still further fact that the agent told the insured that such indorsement in writing was unnecessary, and that in case of loss the appellant company would pay without regard to such a technicality, we now assume to be true.

1. The naked inquiry, then, is, could the agent of the insurer waive the condition of the contract requiring consent for additional insurance to be made in writing indorsed on the policy? Or, to put it otherwise, is the insurer estopped from claiming a forfeiture by the acts and conduct of its agent? We do not understand that there is any disagreement between counsel as to the character of the agency in this case. Clearly, Roberts, Davis & Co. were general agents. They represented and stood for the company. They received applications, they issued policies, they collected premiums, they received notice of other insurance, and gave consent thereto, and in general they did for the

waived, namely, by writing indorsed upon the policy in the form of a consent to the other insurance. The agent had power to give this consent only in the manner prescribed by the contract. But there is not in the case any proof, even of verbal consent by the agent that the plaintiff might procure further and additional insurance. * * * The effect of such stipulations in a contract of insurance, as well as the manner in which they may be modified or waived by agents of the company, have been so thoroughly discussed and so clearly pointed out that a reference to some of the more recent cases on the subject is all that is needful here. Allen v. German American Ins. Co., 123 N. Y. 6, 25 N. E. 309 (1890); Quinlan v. Providence Washington Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645 (1892); Messelback v. Norman, 122 N. Y. 583, 26 N. E. 34 (1890); Walsh v. Hartford F. Ins. Co., 73 N. Y. 5 (1878)."

[14] That portion of the opinion which holds that there was in fact no breach of warranty in respect to the "iron-safe clause" has been omitted.

company whatever it could do in the matter of making and continuing contracts for insurance. The company, being an artificial creature, could only act through human agencies, and what these general agents did in this case, as indicated above, the company itself may be said to have done. The power to make the contract of insurance by the general agent necessarily involves the power also to modify or vary the same by subsequent contract. The clause in the contract which requires written consent for additional insurance to be indorsed upon the policy is no more unchangeable at the pleasure of the parties than any other provision or condition of the contract. The contract of the insurance evidenced by the policy is no more sacred than any other contract, and we have yet to learn that ordinary contracts between men may not be altered, varied, or wholly abrogated at the election of the parties to them. The condition of the policy requiring consent in writing for additional insurance is inserted for the benefit of the insurer, and we are at a loss to conjecture any reason for holding that the insurer may not waive it at his pleasure. It is a mere method or manner of evidencing the insurer's consent, and it is impossible to conceive why the insurer may not waive this mere manner of consenting, and substitute another. Is it because of some supposed superior dignity of the written over parol? The supposition is vain and idle. The parol contract may modify or put an end to the written contract, just as the written may modify or end the parol. Every new contract, whether written or parol, supersedes the old, whether in parol or writing, according to the will and purpose of the parties.

From what we have already said touching the power of the general agents of the appellant company, it seems to us to necessarily follow that such agents may waive the condition requiring consent in writing for additional insurance. This case, on its facts as found by the jury, goes far beyond the most of the reported cases in which this question has been passed upon by many courts of last resort in accordance with the views which we entertain. Here the insured actually applied to the company, or its general agents standing for it, to have the proper written consent indorsed, and was refused on the declared ground that it was unusual and unnecessary, and that any loss would be promptly adjusted without regard to that technicality. It would be unconscionable to now allow the company to assert a forfeiture for the doing of or the omitting to do that which the insured did or omitted at his own suggestion. To state the offense thus illumined shocks conscience and offends judgment.

May, in his work on Insurance, states the prevailing tendency of judicial opinion in these words: "In many policies the notice of insurance is required to be in writing, and indorsed on the policy, and it has formerly been frequently held to be essential that these particulars should be literally complied with; * * * but the courts have become more liberal in favor of the assured in their construction of this sort of stipulation in policies of insurance. While, as we have seen, the

old rule required the consent to be given in writing, and indorsed on the policy, it is the decided tendency of the modern cases to hold that, if the notice be duly given to the company, or its agent, of the additional insurance, and no objection is made, the company will be estopped from insisting on a forfeiture of the policy because their consent thereto was not indorsed as liberally required by the stipulation." May, Ins. §§ 369, 370.

Wood on Fire Insurance (volume 2, p. 802) has this language: "It has formerly been held that not only notice of other insurance, prior or subsequent, must be given, but also that it must be indorsed upon the policy when so provided therein. But the tendency of the courts latterly is towards a more liberal construction in favor of the assured, and there is now no question but that oral notice, and an oral assent, or acts amounting to an assent, without an indorsement upon the policy, is sufficient."

Flanders on Fire Insurance states the rule thus: "Where, however, the underwriter has notice of the additional insurance, and, although not formally giving his consent thereto, yet by his acts, such as collecting assessments, treats the policy as in full force, it will be a waiver of the right to resist a recovery upon that ground." Fland. Ins. pp. 47, 51, 56, 57.

In the very recent and excellent work of Biddle on Insurance the writer's conclusion from an exhaustive examination of adjudged cases is thus stated: "Probably any condition inserted in the policy for the benefit of the insurer may be waived by him." 2 Bid. Ins. p. 1086.[15]

To the same effect are the following authorities selected from the many examined: Cobb v. Insurance Co., 11 Kan. 93; Pitney v. Insurance Co., 65 N. Y. 6; Young v. Insurance Co., 45 Iowa, 377, 24 Am. Rep. 784; Insurance Co. v. Earle, 33 Mich. 143; Insurance Co. v. Lyons, 38 Tex. 254; Hadley v. Insurance Co., 55 N. H. 110. The rule now announced was foreshadowed and bound up in the cases of Rivara v. Insurance Co., 62 Miss. 720, Association v. Matthews, 65 Miss. 301, 4 South. 62, and Insurance Co. v. Bowdre, 67 Miss. 620, 7 South. 596, 19 Am. St. Rep. 326. * * *

Affirmed.

[15] This power of waiver is not ordinarily possessed by agents of limited authority. See New York Life Ins. Co. v. O'Dom, 100 Miss. 219, 56 South. 379, Ann. Cas. 1914A, 583 (1911).

SECTION 4.—ESTOPPEL

INSURANCE CO. v. WILKINSON.

(Supreme Court of the United States, 1871. 13 Wall. 222, 20 L. Ed. 617.)

In error to the Circuit Court for the District of Iowa; the case being thus:

The Union Mutual Insurance Company, of Maine, insured the life of Mrs. Malinda Wilkinson in favor of her husband. Both husband and wife, prior to the rebellion, had been slaves, and the husband came to Keokuk, Iowa, from Missouri. The company did business in Keokuk (where the application was made and the policy delivered), through an agent, one Ball, to whom it furnished blank applications. The mode of doing business appeared to have been that the agent propounded certain printed questions, such as are usual on applications for insurance on lives, contained in a form of application, and took down the answers; and when the application was signed by the applicant, the friend and physician forwarded it to the company, and if accepted, the policy was returned to this agent, who delivered it and collected and transmitted the premiums.

On this form of application were the usual questions to be answered by the person proposing to effect the assurance; and by the terms of the policy it became void if any of the representations made proved to be untrue.

Among the questions was this one: "Has the party ever had any serious illness, local disease, or personal injury; if so, of what nature, and at what age?" And the question was answered: "No."

So, too, after an interrogatory as to whether the parents were alive or dead,—they being, in the case of Mrs. Wilkinson, both dead,—were the questions and answers: "Question. Mother's age, at her death? Answer. 40. Question. Cause of her death? Answer. Fever."

Mrs. Wilkinson having died, and the company refusing to pay the sum insured, Wilkinson, the husband, brought suit in the court below to recover it. The defence was that the answers as above given to the questions put were false; that in regard to the first one, Mrs. Wilkinson, in the year 1862, had received a serious personal injury, and that in regard to the others, the mother had not died at the age of 40, but at the earlier age of 23, and had died not of fever but of consumption.[16] * * *

[16] That portion of the statement of facts relating to an injury received by the insured by a fall from a tree in childhood, and that part of the opinion which holds that, if the injury resulting from such fall was temporary only, it was not "serious" within the terms of the policy, so as to result in an avoidance of the same, is omitted. Involving the same facts is the case of Wilkinson v. Conn. Mut. Life Ins. Co., 30 Iowa, 119, 6 Am. Rep.

As to the other matter, the age at which the mother died and the disease which caused her death, evidence having been given by the defendant tending to show that she died at a much younger age than forty years, and of consumption, the plaintiff, in avoidance of this, was permitted (under the plaintiff's objection and exception) to prove that the agent of the insurance company, who took down the answers of the applicant and his wife to all the interrogatories, was told by both of them that they knew nothing about the cause of the mother's death, or of her age at the time; that the wife was too young to know or remember anything about it, and that the husband had never known her; and to prove that, there was present at the time the agent was taking the application, an old woman, who said that she had knowledge on that subject, and that the agent questioned her for himself, and from what she told him he filled in the answer which was now alleged to be untrue, without its truth being affirmed or assented to by the plaintiff or the wife.

This the jury found in their special verdict, as they had the other facts, and found that the mother died at the age of 23; did not die of consumption; and that the applicant did not know when the application was signed how the answer to the question about the mother's age and the cause of her death had been filled in. * * *

On the second branch—that relating to the age of the mother—the court said to the jury, that if the applicant did not know at what age her mother died, and did not state it, and declined to state it, and that her age was inserted by the agent upon statements made to him by others in answer to inquiries he made of them, and upon the strength of his own judgment, based upon data thus obtained, it was no defence to the action to show that the agent was mistaken, and that the mother died at the age of 23 years.

Verdict and judgment having gone for the plaintiff, the insurance company brought the case here on error.

Mr. Justice MILLER delivered the opinion of the court. * * * Passing then to the second branch of the case. The defendant excepted to the introduction of the oral testimony regarding the action of the agent, and to the instructions of the court on that subject; and assigns the ruling of the court as error on the ground that it permitted the written contract to be contradicted and varied by parol testimony.

The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate, and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written

657 (1870), where a similar conclusion is reached with reference to a warranty against "any accidental or serious injury."

instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake, or fraud, the principle has been long recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing, would, as was said in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. It is upon this principle that courts of equity proceed in giving the relief just indicated; and though the courts, in a common law action, may be more circumscribed in the freedom with which they inquire into the origin of written agreements, such as inquiry is not always forbidden by the mere fact that the party's name has been signed to the writing offered in evidence against him.

In the case before us a paper is offered in evidence against the plaintiff containing a representation concerning a matter material to the contract on which the suit is brought, and it is not denied that he signed the instrument, and that the representation is untrue. But the parol testimony makes it clear beyond a question, that this party did not intend to make that representation when he signed the paper, and did not know he was doing so, and, in fact, had refused to make any statement on that subject. If the writing containing this representation had been prepared and signed by the plaintiff in his application for a policy of insurance on the life of his wife, and if the representation complained of had been inserted by himself, or by some one who was his agent alone in the matter, and forwarded to the principal office of the defendant corporation, and acted upon as true, by the officers of the company, it is easy to see that justice would authorize them to hold him to the truth of the statement, and that as they had no part in the mistake which he made, or in the making of the instrument which did not truly represent what he intended, he should not, after the event, be permitted to show his own mistake or carelessness to the prejudice of the corporation.

If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made

the contract; and that it was made by the defendant, who procured the plaintiff's signature thereto.

It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels in pais. The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim. It has been applied to the precise class of cases of the one before us in numerous well-considered judgments by the courts of this country. Indeed, the doctrine is so well understood and so often enforced that, if in the transaction we are now considering, Ball, the insurance agent, who made out the application, had been in fact the underwriter of the policy, no one would doubt its applicability to the present case. Yet the proposition admits of as little doubt that if Ball was the agent of the insurance company, and not of the plaintiff, in what he did in filling up the application, the company must be held to stand just as he would if he were the principal.

Although the very well-considered brief of counsel for plaintiff in error takes no issue on this point, it is obvious that the soundness of the court's instructions must be tested mainly by the answer to be given to the question, "Whose agent was Ball in filling up the application?"

This question has been decided differently by courts of the highest respectability in cases precisely analogous to the present. It is not to be denied that the application, logically considered, is the work of the assured, and if left to himself or to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one State, and having in that State their principal business office, send these agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy, rarely sees or knows anything about the company or its officers by whom it is issued, but looks to

and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company, in all that is said or done in making the contract.[17] Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument being that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are, primâ facie coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal.

In the fifth edition of American Leading Cases, after a full consideration of the authorities, it is said: "By the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and procure customers, they not unfrequently mislead the insured, by a false or erroneous statement, of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers."

The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed

[17] The courts have frequently referred to the peculiar conditions under which insurance contracts are made as a justification for relaxing the parol evidence rule. See People's Fire Ins. Ass'n v. Goyne, 79 Ark. 315, 96 S. W. 365, 16 L. R. A. (N. S.) 1180, 9 Ann. Cas. 373 (1906); Chismore v. Anchor Fire Ins. Co., 131 Iowa, 180, 108 N. W. 230 (1906).

to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.

Judgment affirmed.[18]

VAN SCHOICK v. NIAGARA FIRE INS. CO.

(Court of Appeals of New York, 1877. 68 N. Y. 434.)

FOLGER, J. This was an action upon a policy of fire insurance. It contained this condition: "Any interest in property insured not absolute, or that is less than a perfect title, or if a building is insured that is on leased ground, the same must be specifically represented to the company, and expressed in this policy in writing, otherwise the insurance shall be void." The fact is, that part of the property described in the policy, as subject of the insurance, was a building on leased ground. That fact was not expressed in writing in the policy. The defendant claims that thereby the insurance was void, and puts itself thereon as a defense to the action. It is to be observed of this condition that it is not one of those which are subsequent to the formation of the contract; a breach of which may occur after there has been a valid contract made and entered into, and continued in existence for a part of its prescribed term. It is a condition precedent, lying at the threshold of the making of the contract, and which if not then performed, or not then obviated, prevents the formation of an enforceable contract. It is obvious that this building being on leased

[18] The principal case is affirmed and followed in Insurance Co. v. Mahone, 21 Wall. (U. S.) 152, 22 L. Ed. 593 (1874). It is distinguished in New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934 (1886), as follows: "The present case is very different from Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617 (1871), and from American Ins. Co. v. Mahone, 21 Wall. 152, 22 L. Ed. 593 (1874). In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. Reference was made to the interested and officious zeal of insurance agents to procure contracts, and to the fact that parties who were induced to take out policies rarely knew anything concerning the company or its officers, but relied upon the agent who had persuaded them to effect insurance, 'as the full and complete representative of the company in all that is said or done in making the contract,' and the court held that the powers of the agent are prima facie coextensive with the business intrusted to his care, and would not be narrowed by limitations not communicated to the person with whom he dealt. Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, though nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is, therefore, bound by its statements."

ground, the very moment that the policy passed from the defendant to the plaintiff, the insurance on it was void, if the condition holds. They were concurrent acts, the delivery of the contract, and a breach of this condition; so that at the same instant that the defendant said we insure this building, at the same instant the condition was broken and the insurance was void. So that if nothing is shown to break the rigid effect of this condition, there never was any insurance by this defendant upon that building.

We would scarce expect two parties to go through so senseless and trifling an act, if the facts were known to each at the time; but would rather conclude that they had by words or act agreed that the condition should not be considered as binding. "If these defendants were an entity, and could have stood near to that building, when the oral negotiation for insurance was made and completed, and have seen" and known that it was upon leased ground; "could it fairly be contended that they would have offered to the plaintiff, or that he would knowingly have received, as the correctly written evidence of the contract, this policy, with the condition in question, contained in it as an operative and binding clause? We cannot suppose that either plaintiff or defendant would do the utterly absurd thing of making, with deliberation and knowledge, a contract that was void from inception, and was in contradiction of the facts and statements of the negotiation." It is plain that the plaintiff and the agent meant to contract and did contract for the insurance of that building, as a building on leased land. Cone v. Niagara Falls Fire Ins. Co., 60 N. Y. 619. Hence we are not surprised that the plaintiff claims that the fact that the building was on leased ground, was made known to the defendant when the policy was applied for: and that the policy was delivered and the premiums accepted by them, without insisting upon the fact and the condition. He makes that action of the company, with that knowledge, his reply to their defense, based on that condition and its breach.

We must first inquire, whether the plaintiff is right as to the fact of the prior knowledge of the defendant that the building was upon leased ground. It is shown that at a time previous to the issuing of this policy, the facts in relation to the title of the property, just as they were (that the land was owned by one person, and the building by another, and the contract between them), were told to one Lewis, an insurance agent. This Lewis, when the policy in suit was issued, having this information, and with a view to this insurance, asked if there was any change in the property, and was told that there was not. So that at the time of the issuing of this policy, Lewis was informed of the fact, that this building was within the scope of this condition. It is now to learn, if Lewis was the agent or substantially so of the defendant. It is shown that one Doolittle was the commissioned and ostensible agent of the defendant, but that Lewis and he were in partnership in the business of soliciting and procuring insurance; that Lewis did with assent of Doolittle so act as to this defend-

ant, that such action was known to defendant and not disapproved of by it; that a joint commission had for some time been promised by the defendant to those two as its agents, which was delayed, but finally issued before the delivery of this policy. Bodine v. Exchange Fire Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566. We think that the facts bring the case within that decision. So that, as the information of the agent is the information of his principal, the defendant when it accepted this risk, had information that this building stood upon leased ground. Besides that, in stating these facts, as they appeared to him, on the motion of the defendant that the court direct a verdict for it, the learned judge who held the Circuit assumed or found that Lewis had the relations of an agent to the defendant. No objection was made by the defendant to this, nor any request to go to the jury upon it as a question of fact. So it must be taken as a conceded fact in the case. Tallman v. Atlantic Ins. Co., 42 N. Y. 87.

And so again comes up the oft-recurring and still vexed question between insurance companies and their policy-holders, whether a fact, thoroughly well known and comprehended by both sides to the contract before it is delivered, may, by force of some condition, crouched unseen in the jungle of printed matter with which a modern policy is overgrown, make a defense for the company, after the catastrophe and damage has happened against which it professes to guard. It is to be confessed that the decisions of this State do not, upon a cursory perusal at least, seem strictly in harmony, in regard to it. There are cases which hold that where an application is made a part of the policy by the terms of it, and some false assertion has been inserted in the application by the agent, when the truth has been at the same time well known to him, that the insured shall not be prejudiced thereby. Rowley v. Empire Ins. Co., 42 N. Y. 557; Plumb v. Catt. County Mut. Ins. Co., 18 N. Y. 392, 72 Am. Dec. 526; Ames v. N. Y. Ins. Co., 14 N. Y. 253. There are others, where the fact fell within the condemnation of some condition of the policy; yet as the fact as it existed was known to the company, it was held to be estopped from setting up the condition against a recovery. 14 N. Y., supra; Bidwell v. N. W. Ins. Co., 24 N. Y. 302; Bodine v. Exchange Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566. There are others, in which there was a suit in equity, seeking a reformation of the contract, and it was held that the facts showed unmistakably that the parties never meant to enter into a contract with such a condition or description in it as was set up against a recovery. Cone v. Niagara Falls Fire Ins. Co., 60 N. Y. 619; Maher v. Hibernia Ins. Co., 67 id. 283. In the latter case, the facts made a clear estoppel en pais against the company. It has also been held that a warranty, part of the printed matter of the policy, has been dispensed with by the oral agreement of the parties made before the delivery of the policy. McCall v. Sun Mut. Ins. Co., 66 N. Y. 505. On the other hand, in an action at law, it has been

held that where the terms of the policy are clear and unambiguous, parol proof is inadmissible to vary them, or to show that either or both parties were not aware that they were exchanging a contract such as was requested, and as agreed with the facts in the situation of the property. Pindar v. Resolute Fire Ins. Co., 47 N. Y. 114. See, also, Rohrbach v. Germania Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451. And so it has been held that parol proof is not admissible to show that both parties knew that a statement in an application for a policy was not true. Ripley v. Ætna Ins. Co., 30 N. Y. 136; 86 Am. Dec. 362. Other cases bearing upon the subject might be cited—quantum suff.

There is no doubt but that ordinarily considered, this condition in the policy was a warranty that the building did not stand upon leased land; and that the truth of that warranty became a condition precedent to any liability on the part of the defendant. Yet there is no doubt too that a condition in a policy may be waived by the insurer, or, as some cases put it, he be estopped from setting it up, and that such result may be worked by parol, or by act without words. It has been held over and over, that the customary clause in a policy that it will not be binding upon the insurer until the premium is paid in fact may be waived by parol, or by act, and the policy may be delivered and become a binding contract upon the insurer without payment in hand of the premium. Trustees v. Brooklyn F. Ins. Co., 19 N. Y. 305; Sheldon v. Atlantic F. Ins. Co., 26 N. Y. 460, 84 Am. Dec. 213; Wood v. Poughkeepsie Ins. Co., 32 N. Y. 619; Boehen v. Williamsburgh Ins. Co., 35 N. Y. 131, 90 Am. Dec. 787; Bodine v. Ins. Co., supra. As to other waivers, see Ludwig v. Jersey City Ins. Co., 48 N. Y. 384, 8 Am. Rep. 556, and cases there cited; Shearman v. Niagara Fire Ins. Co., 46 N. Y. 532, 7 Am. Rep. 380. Now in this first class of cases, it has been thought that the fact that the insurer delivered to the insured the written contract, as the consummated agreement between them, and did not then exact present payment of the premium as a necessary precedent to delivery, was too plainly in contradiction with the condition for prepayment for it to be supposed that it was meant by the insurer or supposed by either party that it was intended to make that condition a potent part of the contract. Such a provision, it is said, could have no effect upon the delivered and perfect contract in which it was contained, 19 N. Y., supra. It would be imputing a fraudulent intent to the defendant in this case, to say or to think that they did not mean when they delivered this policy to the plaintiff, to give him a valid and binding contract of insurance, or that they did not mean that he should believe that he had one, or that they did not suppose that he did so believe. And such imputation can be avoided only by supposing that it had overlooked this condition, and so forgotten to express the fact as to the building, in writing, upon the policy; or that it waived the condition, or held itself estopped from setting it up. The condition of prepayment of premium is, like this under consideration, one at the threshold of the making of the con-

tract, and if it is not observed, no valid contract is made unless it is stepped over or thrust aside. It is consistent with fair dealing and a freedom from fraudulent purpose, to hold that one or the other was done; that is, that there was waiver, or is estoppel.

There are other conditions precedent which may be waived. Thus in Myers v. Life Ins. Co., 27 Pa. 268, 67 Am. Dec. 462, it is said that the countersigning by the agents is under some circumstances not essential, though required by condition. The ground there stated is, that on an equitable interpretation of the whole contract, it may become the duty of the court to dispense with a portion of the forms of the contract, if it can find any reliable substitute for them; on the principle that cures defective execution of powers, where the intention to execute is sufficiently plain. The contract was to be complete when delivered by the agents, and countersigning by them was to be the appointed evidence of its proper delivery. There may be other evidence to be regarded as equivalent. So here, it was not that the defendant would not at all insure a building on leased lands. They did agree to take a risk upon it. But to have it insured by them, the fact of it being on leased land must be expressed to them. This was done. As evidence that it was done, it must they said in the policy afterward delivered, appear in writing on the policy. This is like countersigning by agent, but one of the forms of making the contract. That the policy was delivered and the premium received, with full purpose of insuring that building, with full purpose of making a valid and obligatory contract, is evidence that through neglect or forgetfulness one of the forms was not observed; or that it was waived by the parties.

This case is to be distinguished from that of Pindar v. Resolute Fire Ins. Co., 47 N. Y. 114. There Pindar asked a policy in a certain form of words. The insurer issued it to him in a different form, and in such form as would not cover certain classes of goods, and as by the presence of those classes in the store rendered the whole policy void. It was not proposed to show that the insurer knew that the very class of goods on which insurance was sought was in the store, and that the policy was delivered with the purpose to insure that class, and with the mutual understanding that by the policy it was insured. Hence that case differs from this, and it was properly held that Pindar was bound by his contract. In Rohrbach's case, supra, the decision went upon the effect of a peculiar clause in the policy, and in that fact is quite different from this. Chase v. Hamilton Ins. Co., 20 N. Y. 52, is put upon a ground very like that in Rohrbach's case; that it was printed in the application, that the company would not be bound by knowledge of the agent, and that the company could not be held thereby unless there was fraud or prevention of the application from making a true statement. Ripley v. Ætna Ins. Co., supra, is to be distinguished from this in hand. There the representation or warranty was promissory. It was an agreement by the applicant that he would thereafter keep a watchman in his mill of nights. This looked to the

future conduct on his part. It was not a part of the form of the contract. And though the agent of the insurer knew the custom of the applicant had not been to keep a watchman in his mill from midnight on the last day of the week till midnight of the first day of the next week, that did not affect his promise thereafter to do differently. It is also said in that case that there may be a waiver of conditions, but only on an agreement founded on a valuable consideration, or when the act relied upon as a waiver is such as to estop a party from insisting on the condition. In the case in hand there is a consideration in the premium paid which would not have been done with an understanding that the condition should remain and be enforced, thus making the payment futile. In the purview of some of the cases there is also an estoppel.

It is difficult to make all the cases upon this subject harmonize; but by the force of authority, we are constrained to hold, that such a condition as this may be waived by the insurer by express words to that effect, or by acts done under such circumstances, as would otherwise impute a fraudulent purpose, and as will estop him from setting up the condition against the insured.[19] * * *

We therefore conclude that the judgment appealed from should be affirmed.[20]

CHURCH, C. J., and ANDREWS and MILLER, JJ., concur. ALLEN, RAPALLO, and EARL, JJ., dissent.

Judgment affirmed.

FRANKLIN FIRE INS. CO. v. MARTIN.

(Court of Errors and Appeals of New Jersey, 1878. 40 N. J. Law, 568, 29 Am. Rep. 271.)

This action was brought upon a policy of insurance, under seal, bearing date April 27, 1870, issued to the plaintiff as owner of the property insured. At the trial before the Circuit, a verdict was had by Martin, the plaintiff below, whereupon this writ of error was sued out by the defendant. Errors were assigned upon the record, and upon the proceedings at the trial.

[19] For the same reasons as discussed in the principal case, the knowledge of a soliciting or sub agent is imputed to the insurer. See Cue v. Connecticut Fire Ins. Co., 89 Kan. 90, 130 Pac. 664, 44 L. R. A. (N. S.) 1218 (1913), where the court quotes with approval from the opinion of Ladd, J., in Gurnett v. Ins. Co., 124 Iowa, 547, 549, 100 N. W. 542, 543 (1904), as follows: "The law is charitable enough to assume, in the absence of any showing to the contrary, that an insurance company intends to execute a valid contract in return for the premium received; and when the policy contains a condition which renders it void at its inception, and this result is known to the insurer, it will be presumed to have intended to waive the condition, and to execute a binding contract, rather than to have deceived the insured into thinking his property is insured when it is not, and to have taken his money without consideration."

[20] See "Parol Waivers under the New York Fire Policy," 12 Columbia Law Rev. 134.

The property insured was described in the policy as "his two-story and attic frame, shingle-roof building, occupied as a dwelling and boarding-house, situate on the west side of the Bergen Point plank road, in Bayonne, Hudson county, New Jersey. Above building known as the 'Mansion House.'"

Among the conditions of insurance were the following: "If the assured shall cause the buildings, goods, or other property to be described in this policy otherwise than as they really are, so that they be charged at a lower premium than is herein proposed, this policy shall be of no force; or, if the risk shall be increased by any means whatever, within the control of the assured, during the continuance of the insurance, and notice thereof be not given to the company, and such increased risk be allowed and endorsed thereon, this policy shall be of no force." * * *

DEPUE, J.[21] * * * Fourth. In the policy, the property insured is described as a building occupied "as a dwelling and boarding-house." This description defines the character of the risk assumed, and is a warranty that the property, at the time of the insurance, was used for that purpose. Dewees v. Manhattan Ins. Co., 35 N. Y. Law, 366. In fact, it was at that time occupied as a dwelling and boarding-house, and also as a country tavern, and in a room back of the bar-room there was kept for use a billiard-table. The property continued to be so used until the fire occurred.

In the conditions of insurance, it is stipulated that if the assured shall cause the buildings, goods or other property insured to be described in his policy otherwise than as they really are, so that they be charged at a lower premium than is therein proposed, the policy shall be of no force. In the classification of risks, drinking-houses and taverns were classified as extra hazardous, and subject to a higher premium than hazardous risks; and billiard-rooms were named in the specially hazardous class, subject to a still higher premium. Dwelling and boarding-houses were not mentioned in any special classification. The consequence of a misdescription of the use of the premises at the date of the insurance is prescribed by the condition mentioned. It does not avoid the policy simply for a misdescription in that respect. To accomplish that result, the misrepresentation must have been operative to cause the insurance to be effected at a lower premium than it would otherwise be subject to; and that question was properly left to the jury. Columbian Ins. Co. v. Lawrence, 2 Pet. 46, 7 L. Ed. 335; 1 Bigelow's Ins. Cas. 264.

Fifth. The insurance was obtained through one Buckley, an agent of the company. The judge received evidence that he inspected the premises at the time of taking the proposals of insurance, and knew the manner in which they were then used, and left the question to the jury whether the parties themselves did not knowingly use the

[21] Part of the statement of facts and part of the opinion are omitted.

term boarding-house to describe the very thing that was insured; and if they did, in that view the knowledge of the agent was material: that if the agent, acting on his own knowledge, making his own survey, undertake to describe the building, it is his description of the risk, and if the company accept it, it agrees that the term used shall describe the risk as it existed.

The evidence in relation to the agent's knowledge of the actual condition of the property was competent on the question whether the assured, by the misdescription, in fact procured the insurance to be made at a lower premium than would otherwise have been demanded. But these instructions were erroneous. They left the jury to find from such knowledge by the agent that the company insured a country tavern under the description of a dwelling and boarding-house—thus making a different contract from that expressed on the face of the policy.

There is a distinction between a representation which is merely collateral to the contract of insurance, and a warranty or condition which is part of the contract itself. A representation collateral to the contract will not avoid the policy though it be untrue, unless it was fraudulently made; but the validity of the entire contract depends upon the truth or fulfilment of the warranties and conditions. Dewees v. Manhattan Ins. Co., 34 N. J. Law, 247. Where the defence is that a representation collateral to the contract was false, and was fraudulently made, the gist of the defence is the fraud of the plaintiff by which the insurer was misled, and induced to make the contract of insurance. To such a defence, proof that the agent of the insurer had knowledge of the true state and condition of the premises, is a complete answer; for with such knowledge no deception is practiced. Marshall v. Columbian Mut. Fire Ins. Co., 27 N. H. 157; Protection Ins. Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 684; Patten v. Insurance Co., 40 N. H. 375; State Mutual Ins. Co. v. Arthur, 30 Pa. 315. A different rule prevails with respect to a warranty contained in the policy; if it is in fact not complied with, the contract falls, without regard to the knowledge of the insurer of the actual condition of the property insured. This distinction between a representation collateral to the contract and a warranty which is part of it, is taken in State Mutual Ins. Co. v. Arthur, supra, and it was there held that knowledge of the insurer or its agent of the exact state and condition of the premises will relieve the insured from the consequences of a false or imperfect representation, but not as against a warranty not complied with.

If the proposal for insurance be prepared by the agent of the company, and he misdescribe the premises, with full knowledge of their actual condition, and there be no fraud or collusion between the agent and the insured, the contract of insurance may be reformed in equity, and made to conform to the condition of the premises as they were known to the agent. Collett v. Morrison, 9 Hare, 162; In re Universal

Non-Tariff Fire Ins. Co., L. R. 19 Eq. 385; Malleable Iron Works v. Phœnix Ins. Co., 25 Conn. 465; Woodbury Savings Bank v. Charter Oak Ins. Co., 31 Conn. 517; Maher v. Hibernia Ins. Co., 67 N. Y. 283. But in an action at law upon the policy, the rights of the parties must be determined by the contract of insurance, which cannot be altered or modified by extrinsic evidence of a different agreement, to be established from a knowledge of the insurer or its agents of the actual condition of the property insured. Dewees v. Manhattan Ins. Co., 35 N. J. Law, 366. When the insurer defends on the ground of a breach of warranty, it is no answer that he knew that such warranty was not in fact true. Columbia Ins. Co. v. Cooper, 50 Pa. 331. Thus, being stipulated in the conditions of insurance that a false description of the property insured should avoid the policy, it was held that a misdescription defeated the plaintiff's right to recover under it, though the statements were known to be false by the insurer's agent who prepared the description, and informed the plaintiff that in that respect the description was immaterial. Smith v. Cash Mut. Ins. Co., 24 Pa. 320. Evidence is not competent in an action on the policy to show that the matter complained of as a breach of warranty was mentioned to the agent at the time of the application, and that he said it was of so little consequence that it need not be mentioned in the policy. Loehner v. Home Mut. Ins. Co., 17 Mo. 247. Nor will it be received to show that the insured informed the agent of the exact condition of his title, and that the agent filled out the application in his own language. Hough v. City Fire Ins. Co., 29 Conn. 10, 76 Am. Dec. 581. The decided weight of authority is against the admission of such evidence as a clear violation of the salutary rule of law, that all prior statements are merged in the concluded contract, and that a contract put in writing cannot be added to or altered by parol testimony. Barrett v. Union Mut. Ins. Co., 7 Cush. (Mass.) 175; Lowell v. Middlesex Ins. Co., 8 Cush. (Mass.) 127; Jenkins v. Quincy Mut. Ins. Co., 7 Gray (Mass.) 370; Kibbe v. Hamilton Mut. Ins. Co., 11 Gray (Mass.) 163; Jennings v. Chenango County Ins. Co., 2 Denio (N. Y.) 75; Rohrbach v. Germania Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451; Columbia Ins. Co. v. Cooper, 50 Pa. 331; Sheldon v. Hartford Fire Ins. Co., 22 Conn. 235, 58 Am. Dec. 420. Many of the cases to the same effect are cited by the Chief Justice in his opinion in Dewees v. Manhattan Ins. Co., as reported in 35 N. J. Law, 366, which, in itself, is a weighty authority against the competency of such evidence.[22] * * *

[22] The court here cites with running comment, as supporting its position, the following cases from Connecticut: Sheldon v. Hartford Fire Ins. Co., 22 Conn. 235, 58 Am. Dec. 420 (1853); Glendale Mfg. Co. v. Protection Ins. Co., 21 Conn. 19, 54 Am. Dec. 309 (1851); Peck v. N. L. Mut. Ins. Co., 22 Conn. 575 (1853); Bevin v. Connecticut Mut. Ins. Co., 23 Conn. 244 (1854); Bebee v. Hartford Co. Mut. Ins. Co., 25 Conn. 51, 65 Am. Dec. 553 (1856); Hough v. City Fire Ins. Co., 29 Conn. 10, 76 Am. Dec. 581 (1860); Woodbury Savings Bank v. Charter Oak Ins. Co., 31 Conn. 517 (1863). Then follows a

The Supreme Court of the United States has held that the policy of insurance issued by the company, and accepted by the insured, must be taken to be the final agreement of the parties, and that if by inadvertence or mistake, stipulated provisions were omitted, or provisions other than those intended were inserted, the remedy was in equity for the correction of the agreement, and that neither party could resort to the verbal negotiations preliminary to the execution of the policy, to contradict or vary its terms, or to ascertain what the contract really was. Ins. Co. v. Lyman, 15 Wall. 664, 21 L. Ed. 246; Insurance Co. v. Mowry, 96 U. S. 544, 24 L. Ed. 674. But in Insurance Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617, the same court, following Plumb v. Cattaraugus Ins. Co., 18 N. Y. 392, 72 Am. Dec. 526, and Rowley v. Empire Ins. Co., 42 N. Y. 557, held that parol evidence that the application of the insured was prepared by the company's agent, and that he filled up, from inquiries made by himself, the answers to the interrogatories, the falsity of which was the breach of warranty relied on, was competent as a matter of estoppel. The only other cases cited for this decision were, Combs v. Hannibal Ins. Co., 43 Mo. 148, 97 Am. Dec. 383, which was itself decided on a following of the two New York cases above cited, and Woodbury Savings Bank v. Charter Oak Ins. Co., 31 Conn. 526, which was a bill in equity for the reformation of the policy.

It is manifest that the theory that such parol evidence, though it may not be competent to change the written contract, may be received for the purpose of raising an estoppel in pais, is a mere evasion of the rule excluding parol testimony when offered to alter a written contract. A party suing on a contract in an action at law, must be conclusively presumed to be aware of what the contract contains, and the legal effect of his agreement is that its terms shall be complied with. Extrinsic evidence of the kind under consideration, must entirely fail in its object, unless its purpose be to show that the contract expressed in the written policy was not, in reality, the contract as made. A defendant cannot be estopped from making the defence that the contract sued on is not his contract, or that his adversary has himself violated it in those particulars which are made conditions to his rights under it, on the ground of negotiations and transactions occurring at the time the contract was entered into, unless the plaintiff is permitted to show, from such sources, that the contract, as put in writing, does not truly express the intention of the parties. The difficulty lies at the very threshold. An estoppel cannot arise except upon proof of a contract different from that contained in the written policy, and an inflexible rule of evidence forbids the introduction of such proof by parol testimony, when offered to vary or affect the terms of the written instrument. The subject has been so fully and forcibly discussed by

review of the New York cases, which is wholly omitted. See Van Schoick v. Niagara Fire Ins. Co., 68 N. Y. 438 (1877), reported ante, p. 511.

Chief Justice Beasley, in Dewees v. Manhattan Ins. Co., that it is unnecessary to pursue it further.

Nor is the reasoning of the learned justice who delivered the opinion in Insurance Co. v. Wilkinson, that the admission of such testimony is rendered necessary by the manner in which agents are sent over the country by insurance companies, and stimulated by them to exertions in effecting insurance—which often leads to a disregard of the true principles of insurance, as well as fair dealing—any more satisfactory. It introduces into the administration of the law the novel doctrine that the rules which regulate the admission of evidence fluctuate with the character of the agencies parties employ in transacting business, and upon that foundation establishes an exceptional rule of evidence to be applied to an entire class of contracts, whether agents, ignorant, incompetent, or unscrupulous, were employed or not. It leaves the whole subject of contracts of insurance at the mercy of a kind of evidence which is regarded as too untrustworthy and unreliable ever to control contracts in writing.

The cases usually cited for the proposition that a contract of insurance is excepted out of the class of written contracts with respect to the admissibility of parol evidence, to vary or control the written contract, will be found, on examination, to be, to a large extent, those in which the proof has been received with a view to the reformation of the policy in equity, or to meet the defence that the contract was induced by false and fraudulent representations not embodied in the contract, or are the decisions of courts in which the legal and equitable jurisdictions are so blended that the functions of a court of equity have been transferred to the jury box. A distinction is sometimes made between policies issued by a stock company and those issued by a mutual company. This distinction is without any substance. In a mutual company, the insured, by taking out policies, become members of the company. But, nevertheless, a member of a corporation, and even a director, in dealing with the corporation, stand, with respect to their contracts, just the same as a stranger, (Stratton v. Allen, 16 N. J. Eq. 229,) and the powers of agents of every kind of principals, to act for and bind their principals, are determined by the unvarying rule of ascertaining what authority is delegated to them. How the contract was effected, whether directly with the insurer or by the intervention of agents, is of no consequence. The question of the admissibility of the testimony does not relate to the method by which the contract was made. It concerns the rule of evidence by which the contract, however made, shall be interpreted.

Upon principle, it is impossible to perceive on what ground such testimony should be received. A policy of insurance is a contract in writing, of such a nature as to be within the general rule of law that a contract in writing cannot be varied or altered by parol testimony. If it be ambiguous in its terms, parol evidence such as would be com-

petent to remove an ambiguity in other written contracts, may be resorted to for the purpose of explaining its meaning. If it incorrectly or imperfectly expresses the actual agreement of the parties, it may be reformed in equity. If strict compliance with the conditions of insurance, with respect to matters to be done by the insured after the contract has been concluded, has been waived, such waiver may, in general, be shown, by extrinsic evidence, by parol. Further than this, it is not safe for a court of law to go. To except policies of insurance out of the class of contracts to which they belong, and deny them the protection of the rule of law that a contract which is put in writing shall not be altered or varied by parol evidence, of the contract the parties intended to make, as distinguished from what appears, by the written contract, to be that which they have in fact made, is a violation of principle that will open the door to the grossest frauds. If, as was said by Judge Folger, in Van Schoick v. Niagara Fire Ins. Co., "a fact thoroughly well known, and comprehended by both sides to the contract before it is delivered, may, by force of some condition, crouched unseen in the jungle of printed matter with which a modern policy is overgrown, make a defence for the company, after the catastrophe and damage have happened, against which it professes to guard," the remedy is with the legislature to prescribe what conditions only shall be valid, and to compel the printing of them in the policy, in such a manner as to be capable of being read and understood. A court of law can do nothing but enforce the contract as the parties have made it. The legal rule that in courts of law the written contract shall be regarded as the sole repository of the intentions of the parties, and that its terms cannot be changed by parol testimony, is of the utmost importance in the trial of jury cases, and can never be departed from without the risk of disastrous consequences to the rights of parties.

In the present case, the property insured was described in the policy as a dwelling and boarding-house. There was no ambiguity in the terms used, that justified resort to extrinsic evidence to explain the meaning of the contract. The effect given to the testimony on this subject, by the charge of the court, was to change the terms of the contract and reform it, and make another and a different contract. In this there was error, for which the judgment should be reversed. [23]

For affirmance—Dixon, Clement, Lilly. 3.

For reversal—The Chancellor, Chief Justice, Depue, Reed, Scudder, Van Syckel, Woodhull, Dodd, Green. 9.

[23] See, in accord, Bennett v. St. Paul Fire & Marine Ins. Co., 55 N. J. Law, 377, 27 Atl. 641 (1893).

BIGGAR v. ROCK LIFE ASSURANCE CO.

(High Court of Justice, King's Bench Division, [1902] 1 K. B. 516.)

WRIGHT, J.[24] In this case Biggar, who was a publican, seems to have been canvassed by the insurance company's agents, who in February induced him to send in a proposal for insurance against accidents. The ordinary course would have been for the applicant to fill in the answers to the questions in the proposal form; but in the present case Cooper, the company's agent, filled up the proposal form without consulting Biggar as to the answers to be given, and then invited Biggar to sign the form so filled up, which Biggar did without reading it. The proposal form so signed contained not only the questions, with the answers inserted by the agent, but also a declaration at the foot to which Biggar himself signed his name, and which stated (inter alia) that "no company has ever declined to assure me nor to renew my policy," and also that he requested the company to grant "a policy in accordance with the above particulars"; by the declaration Biggar further agreed that "the above statements shall form the basis of the contract." The answers inserted by Cooper, the agent, were false in many material particulars; but Biggar was not aware of their falsity, and apparently was not aware of what the answers were in fact or of what were the questions to which they were the answers. This false proposal form was afterwards transmitted to the company by Cooper and the proposal was accepted; the premium was then paid by Biggar through Cooper and the policy was issued. Some little time afterwards Biggar met with an accident, and the question now is whether he is entitled to recover on the policy.

It is plain that the policy is prima facie avoided, for some of the particulars and statements in the answers, the correctness of which was a condition precedent to the validity of the policy, were false; Biggar, therefore, cannot recover unless he is able to show that the insurance company is prevented from setting up that ground of avoidance by reason of its agent, Cooper, having acted in fraud of his principals. I will deal with a minor point first. It is said that in any case (whatever may be the proper decision as to the main question here) the claimant is disentitled to recover, because he signed a paper containing certain other particulars, and especially the statement that no company had ever declined to assure him or to renew his policy. I am inclined to think that that is of itself sufficient to prevent him from having any claim against the company; but I do not wish to rest my decision upon that, because I do not think the case was stated with reference to that particular contention, and I do not think it is so explicit with regard to it as I could have wished, I do not feel quite clear that this representation which he signed is sufficiently untrue, and I prefer to deal with the case upon the main point.

[24] The statement of facts is omitted.

As to that, I agree with the principles which were laid down by the Supreme Court of the United States in New York Life Insurance Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, decided in 1885, in which the judgment of the whole Court was delivered by Field, J. It seems to me that that case is very much in point, although in some respects it is different from the present case; in some respects it is weaker, and in some respects stronger. I agree with the view taken by the Supreme Court in that case, and apparently in other cases there cited, that if a person in the position of the claimant chooses to sign without reading it a proposal form which somebody else filled in, and if he acquiesces in that being sent in as signed by him without taking the trouble to read it, he must be treated as having adopted it. Business could not be carried on if that were not the law. On that ground I think the claimant is in a great difficulty. But, further, it seems to me that here, as in the case of New York Life Insurance Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, it would be wrong to treat Cooper, the company's agent, as their agent to suggest the answers which Biggar was to give to the questions in the proposal. Cooper was an agent to receive proposals for the company. He may have been an agent, as Lindley and Kay, L. JJ., put it in Bawden v. London, Edinburgh & Glasgow Insurance Co., [1892] 2 Q. B. 534, to put the answers in form; but I cannot imagine that the agent of the insurance company can be treated as their agent to invent the answers to the questions in the proposal form. For that purpose, it seems to me, if he is allowed by the proposer to invent the answers and to send them in as the answers of the proposer, that the agent is the agent, not of the insurance company, but of the proposer.

I cannot put the doctrine better than in the language of the Supreme Court in New York Life Insurance Co. v. Fletcher, 117 U. S. 519, at pages 532, 533, 6 Sup. Ct. 837, at page 29 L. Ed. 934, in the case referred to, where they are citing from and adopting previous decisions of the Supreme Court. They say (speaking of another case): "The application was signed without being read. It was held that the company was not bound by the policy; that the power of the agent would not be extended to an act done by him in fraud of the company and for the benefit of the insured, especially where it was in the power of the assured by reasonable diligence to defeat the fraudulent intent; that the signing of the application without reading it or hearing it read was inexcusable negligence; and that a party is bound to know what he signs." Then, speaking of the agent's conduct, they say: "His conduct in this case was a gross violation of duty, in fraud of his principal, and in the interest of the other party. To hold the principal responsible for his acts, and assist in the consummation of the fraud, would be monstrous injustice. When an agent is apparently acting for his principal, but is really acting for himself or third persons and against his principal, there is no agency in respect

to that transaction, at least as between the agent himself, or the person for whom he is really acting, and the principal. * * * The fraud could not be perpetrated by the agent alone. The aid of the plaintiff or the insured, either as an accomplice or as an instrument, was essential." Then they go on: "She says that she and her husband signed the application without reading it and without its being read to them. That of itself was inexcusable negligence. The application contained her agreements and representations in an important contract. When she signed it she was bound to know what she signed. The law requires that the insured shall not only in good faith answer all the interrogatories correctly, but shall use reasonable diligence to see that the answers are correctly written. It is for his interest to do so, and the insurer has a right to presume that he will do it. He has it in his power to prevent this species of fraud, and the insurer has not."

That doctrine of the Supreme Court of the United States seems to me to be good sense and good law. Even if those doctrines are not to be applied to their full extent, still I cannot conceive how this policy can be held to be binding on the company. The very basis of the policy is the statements in the proposal. These statements are false in several material respects. How, then, can the policy be binding on the company? If the plaintiff is entitled to anything, I think that the most he could ask for would be that the Court should say that the contract is void on the ground of either fraud or mistake, with the consequence, perhaps, that he may be entitled to recover back the premium that he paid; but I cannot see how it can be held under these circumstances that the company is bound by the policy. I see no equity against the company in this case—no equity, for instance, such as might exist on the ground of receipt of premium with knowledge of the falsity of the statements. They never knew of the falsity of the statements, and they never knew that the proposal form had been filled in with answers invented by the person purporting to act as their agent. I think the answer to the question asked by the learned arbitrator must be that the facts stated show a defence in law.

Judgment for the company.

NORTHERN ASSUR. CO. OF LONDON v. GRAND VIEW BUILDING ASS'N.

(Supreme Court of the United States, 1902. 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213.)

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a decision which affirmed a judgment of the Circuit Court for the District of Nebraska in favor of plaintiff in an action on a policy of fire insurance. Reversed.

The plaintiff declared on a policy of insurance for $2,500 issued on

December 31, 1896, by the defendant company, which policy contained among others the following provisions: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy. * * * This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed herein or added thereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Plaintiff's declaration further alleged that while at the time of the issue of defendant's policy there was existing insurance on the property in question to the amount of $1,500 in the Firemen's Fund Insurance Company, yet the plaintiff before the issue of the policy had fully disclosed the fact of such subsisting insurance to defendant's recording agent at Lincoln, Nebraska, A. D. Borgelt, who then had full authority from defendant to countersign and issue its policies and accept fire insurance risks in its behalf and accept and receive the premium therefor, and who in fact accepted said risk and issued said policy, and accepted and received said premium as such agent in behalf of defendant with knowledge beforehand of said concurrent insurance, and with the intent knowingly to waive the condition of said policy that 'it shall be void if the insured now has or shall hereafter make or procure any other contract of insurance' on the property covered thereby. And by the aforesaid several acts and by procuring, receiving, accepting, and retaining of said insurance premium with knowledge of said subsisting concurrent insurance the defendant has waived the said condition and is estopped to claim benefit thereof, and is bound by its said policy notwithstanding said condition.

The defendant's answer specifically denied any knowledge of the other insurance, alleged that the total value of the property had been represented by the insured to be only $3,500, and relied upon the breach of the conditions above quoted.

The jury in a special verdict found the issue of the defendant's policy and the existence of the other insurance as above stated, the destruction of the property insured by fire on June 1, 1898, that the cash value of the property at the time of its destruction was $4,140;

that at the time of the issue of the policy in suit the existence of the other insurance was known to Borgelt, agent of the defendant; and that the premium paid to defendant had been duly tendered to and refused by the plaintiff.

The trial court entered judgment for the plaintiff on this verdict, and on appeal this judgment was affirmed by the United States Circuit Court of Appeals for the eighth circuit. 10 Fed. 77, 41 C. C. A. 207.

Mr. Justice SHIRAS delivered the opinion of the court.[25] * * * Over insurance by concurrent policies on the same property tends to cause carelessness and fraud, and hence a clause in the policies rendering them void in case other insurance had been or should be made upon the property and not consented to in writing by the company, is customary and reasonable.

In the present case, such a provision was expressly and in unambiguous terms contained in the policy sued on, and it was shown in the proofs of loss furnished by the insured, and it was found by the jury, that there was a policy in another company outstanding when the present one was issued. It also was made to appear that no consent to such other insurance was ever indorsed on the policy or added thereto.

Accordingly it is a necessary conclusion that by reason of the breach of the condition the policy became void and of no effect, and no recovery could be had thereon by the insured unless the company waived the condition. The question before us is therefore reduced to one of waiver. The policy itself provides the method by which waiver should be made: [Quoting provision given above.]

Before proceeding to a direct consideration of the question before us, it may be well to inquire into the principles established by the authorities as applicable to such cases.

It is a fundamental rule, in courts both of law and equity, that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. This rule is thus expressed in Greenleaf on Evidence (12th Ed.) § 275: "When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties is rejected." * * *

[25] The very lengthy statement of facts given in the official report is greatly abbreviated, and portions of the excessively long opinion are omitted.

This rule has always been followed and applied by the English courts in the case of policies of insurance in writing.[26]

Coming to the decisions of our state courts, we find that, while there is some contrariety of decisions, the decided weight of authority is to the effect that a policy of insurance in writing cannot be changed or altered by parol evidence of what was said prior or at the time the insurance was effected; that a condition contained in the policy cannot be waived by an agent, unless he has express authority so to do; and then only in the mode prescribed in the policy; and that mere knowledge by the agent of an existing policy of insurance will not affect the company unless it is affirmatively shown that such knowledge was communicated to the company.

[After extensive comment upon the cases cited in the note below,[27] and especially upon the New York cases, the court proceeded as follows:]

It is doubtless true that in several later cases the New York court of appeals seems to have departed from the principles of the previous cases, and to have held that the restrictions inserted in the contract upon the power of an agent to waive any condition, unless done in a particular manner, cannot be deemed to apply to those conditions

[26] In support of this undisputed proposition the court cites Weston v. Emes, 1 Taunt. 115 (1808); Robertson v. French, 4 East, 130 (1803); Flinn v. Tobin, 1 Moody & M. 367 (1829); Preston v. Merceau, 2 W. Bl. 1249 (1778); Pickering v. Dowson, 4 Taunt. 779 (1813); Powell v. Edmunds, 12 East, 6 (1810); Smith v. Jeffryes, 15 Mees. & W. 561 (1846); Gale v. Lewis, 9 Q. B. 730 (1846); Acey v. Fernie, 7 Mees. & W. 151 (1840); and quotes at length from Western Assurance Company v. Doull, 12 Can. S. C. 446 (1886), which involved a claim of a parol waiver subsequent to the issue of the policy in suit made in a manner clearly unauthorized.

[27] Here the court makes an extensive quotation from Hale v. Mechanics' Mut. Fire Ins. Co., 6 Gray (Mass.) 169, 66 Am. Dec. 410 (1856), and cites with comment Worcester Bank v. Hartford Fire Ins. Co., 11 Cush. (Mass.) 265, 59 Am. Dec. 145 (1853); Smith v. Niagara Fire Ins. Co., 60 Vt. 682, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. Rep. 144 (1888); Wilson v. Conway Fire Ins. Co., 4 R. I. 141 (1856); Cleaver v. Traders' Ins. Co., 65 Mich. 527, 32 N. W. 660, 8 Am. St. Rep. 908 (1887), and same case in 71 Mich. 414, 39 N. W. 571, 15 Am. St. Rep. 275 (1888). All these cases hold that an alleged waiver, made without authority and subsequently to the issue of policy, is not binding on the insurer. The court further cited Sheldon v. Hartford Fire Ins. Co., 22 Conn. 235, 58 Am. Dec. 420 (1853); Glendale Woolen Mfg. Co. v. Protection Ins. Co., 21 Conn. 19, 37, 54 Am. Dec. 309 (1851); Hough v. City Fire Ins. Co., 29 Conn. 10, 76 Am. Dec. 581 (1860); and with comment and lengthy quotation the following New York cases: New York Ins. Co. v. Thomas, 3 Johns. Cas. (N. Y.) 1 (1802); Jennings v. Chenango County Mut. Ins. Co., 2 Denio (N. Y.) 75 (1846); Fowler v. Metropolitan Life Ins. Co., 116 N. Y. 389, 22 N. E. 576, 5 L. R. A. 805 (1889); Atty. Gen. v. North America Life Ins. Co., 82 N. Y. 172 (1880); People v. Knickerbocker Life Ins. Co., 103 N. Y. 480, 485, 9 N. E. 35 (1886); Douglas v. Knickerbocker Life Ins. Co., 83 N. Y. 492 (1881); Baumgartel v. Providence Washington Ins. Co., 136 N. Y. 547, 32 N. E. 990 (1893). None of these cases properly involved a question of estoppel arising out of defendant's delivery of a policy known by the defendant to be void by its terms, and meaningless unless the defendant intends by such misleading delivery to get the insured's premium money without any consideration therefor.

which relate to the inception of the contract when it appears that the agent has delivered it and received the premiums *with full knowledge of the actual situation.* To take the benefit of a contract *with full knowledge of all the facts,* and attempt afterwards to defeat it, when called upon to perform, by asserting conditions relating to those facts, would be to claim that no contract was made, and thus operate as a fraud upon the other party. Robbins v. Springfield F. & M. Ins. Co., 149 N. Y. 484, 44 N. E. 159; Wood v. American F. Ins. Co., 149 N. Y. 385, 44 N. E. 80, 52 Am. St. Rep. 733. But see Rohrback v. Germania F. Ins. Co., 62 N. Y. 63, 20 Am. Rep. 451, and Owens v. Holland Purchase Ins. Co., 56 N. Y. 565–570, which are irreconcilable.

The fallacy of this view is disclosed in the phrases we have italicized. It was thereby assumed that the agent had full knowledge of all the facts, that such knowledge must be deemed to have been disclosed by the agent to his principal, and, that, consequently, it would operate as a fraud upon the assured to plead a breach of the conditions. This mode of reasoning overlooks both the general principle that a written contract cannot be varied or defeated by parol evidence, and the express provision that no waiver shall be made by the agent except in writing indorsed on the policy. As we shall hereafter show when we come to consider the meaning and legal purport of the contract in suit, such express provision was intended to protect both parties from the dangers involved in disregarding the rule of evidence. The mischief is the same whether the condition turned upon facts existing at and before the time when the contract was made, or upon facts subsequently taking place.[28] * * *

It must be conceded that it is shown, in the able brief of the defendant in error, that, in several of the states, the courts appear to have departed from well-settled doctrines, in respect both to the incompetency of parol evidence to alter written contracts, and to the binding effect of stipulations in policies restricting the authority of the company's agents. The nature of the reasoning on which such courts have proceeded will receive our consideration when we come to discuss the particular terms of the contract before us.

Leaving, then, the state courts, let us inquire what is the voice of the federal authorities.

[28] The court here quotes at great length from Franklin Fire Ins. Co. v. Martin, 40 N. J. Law, 568, 29 Am. Rep. 271 (1878), ante, p. 516, and Dewees v. Manhattan Ins. Co., 35 N. J. Law, 366 (1872), but omits that part of the opinion in the former case in which the New Jersey court unqualifiedly repudiates the rule of the Supreme Court of the United States as laid down in Union Mutual Life Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617, ante, p. 506. The opinion then discusses, with quotations, the following Pennsylvania cases: Smith v. Cash Mut. Ins. Co., 24 Pa. 320 (1855); Columbia Ins. Co. v. Cooper, 50 Pa. 331 (1865); Commonwealth Mut. Fire Ins. Co. v. Huntzinger, 98 Pa. 41 (1881); Kalmutz v. Northern Mut. Ins. Co., 186 Pa. 571, 40 Atl. 816 (1898); Elliott v. Lycoming County Ins. Co., 66 Pa. 22, 26, 5 Am. Rep. 323 (1870).

We do not consider it necessary or profitable to examine in detail the decisions of the circuit courts or of the circuit courts of appeals. It is sufficient, for our present purpose, to say that the circuit court of appeals for the seventh circuit has held consistently to the doctrines on this subject laid down by the English and American courts generally (United Firemen's Ins. Co. v. Thomas, 47 L. R. A. 450, 27 C. C. A. 42, 53 U. S. App. 517, 82 Fed. 406), and that the court of appeals for the eighth circuit, in the present case, has, by a majority of its members, adopted and applied the view that a written contract may, in an action at law, be changed by parol evidence, and that such clauses as restrict the power of agents of insurance companies to contract otherwise than by some writing should be given effect, if at all, as they respect such modifications of a policy as are made or attempted to be made after it has been delivered and taken effect as a valid instrument, and should not be considered as having relation to acts done by the company or its agents at the inception of the contract. 41 C. C. A. 207, 101 Fed. 77.

In such divergence of decisions, we have deemed it proper to have the present case brought before us by a writ of certiorari.

As to the fundamental rule, that written contracts cannot be modified or changed by parol evidence, unless in cases where the contracts are vitiated by fraud or mutual mistake, we deem it sufficient to say that it has been treated by this court as invariable and salutary. The rule itself and the reasons on which it is based are adequately stated in the citations already given from the standard works of Starkie and Greenleaf.

Policies of fire insurance in writing have always been held by this court to be within the protection of this rule.

The first case to be examined is Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 10 L. Ed. 1044. The importance of this case is great, because, if the conclusion there reached was sound when expressed, and if it has not been overruled by our subsequent decisions, it is decisive of the case before us.[29] * * *

[29] The lengthy discussion of this case is necessarily omitted. The closing paragraphs of that part of the opinion in Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 10 L. Ed. 1044 (1842), quoted in the principal case, with the conclusions drawn therefrom, are as follows: "'The third instruction prayed the court to instruct the jury that if the Washington Insurance Company had notice, in fact, of the existence of the policy in the American office, that "was in law a compliance with the terms of the policy." The court refused to give the instruction as prayed, but instructed the jury that at law, whatever might be the case in equity, mere parol notice of such insurance was not, of itself, sufficient to comply with the requirements of the policy declared on; but that it was necessary, in case of any such prior policy, that the same should not only be notified to the company, but should be mentioned in or indorsed upon the policy; otherwise the insurance was to be void and of no effect. We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation of the policy; and it can never be properly said that the stipulation in the policy is complied with, when there has been no such mention or indorsement as

Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 10 L. Ed. 1044, has been frequently referred to as an authority in subsequent cases on points collateral to the one we are now considering. Taylor v. Benham, 5 How. 260, 12 L. Ed. 143; Russell v. Southard, 12 How. 145, 13 L. Ed. 929; Oates v. First Nat. Bank, 100 U. S. 246, 25 L. Ed. 583; Burgess v. Seligman, 107 U. S. 34, 27 L. Ed. 365, 2 Sup. Ct. 10.

In Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183, 189, 30 L. Ed. 644, 646, 7 Sup. Ct. 500, 502, we find Carpenter v. Providence Washington Ins. Co. cited, per Mr. Justice Gray, as an authority for the proposition that "the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract."

It is not pretended in the opinion of the majority in the circuit court of appeals in the present case that the case of Carpenter v. Providence Washington Ins. Co. has been modified or overruled by this court, but the cases relied on by that court are wholly decisions of several state courts and of some of the circuit courts. Nor is it claimed by the learned counsel for the defendant in error that the Carpenter Case has been formally overruled or modified by this court. He, however, does cite three decisions of this court which, as he views them, should be regarded as abandoning the doctrines of that case, viz., Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 232, 20 L. Ed. 622; Eames v. Home Ins. Co., 94 U. S. 621, 24 L. Ed. 298, and Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689.

These cases must, therefore, receive our attention. What, then, was the case of Union Mut. L. Ins. Co. v. Wilkinson? That was a case where the agent of a life insurance company had inserted in the application a representation of the age of the mother of the assured at the time of her death, which was untrue, but which the agent himself obtained from a third person and inserted without the assent of the assured. It was held that this untrue statement contained in the application did not invalidate the policy; that permitting verbal testi-

it positively requires, and without which it declares the policy shall henceforth be void and of no effect.' Two propositions, then, are clearly established by this decision: (1) That where a policy provides that notice shall be given of any prior or subsequent insurance, otherwise the policy to be void, such a provision is reasonable and constitutes a condition, the breach of which will avoid the policy; (2) that where the policy provides that notice of prior or subsequent insurance must be given by indorsement upon the policy or by other writing, such provision is reasonable and one competent for the parties to agree upon, and constitutes a condition, the breach of which will avoid the policy."

It should be observed that the circumstances attending the making of the contract in Carpenter v. Providence Washington Ins. Co. were not such as to entitle the insured to equitable relief, as was decided in Carpenter v. Providence Washington Ins. Co., 4 How. 185, 11 L. Ed. 931 (1846).

mony to show how this untrue statement found its way into the application did not contradict the written contract sued on, but proceeded on the ground that this statement was not that of the assured. The trial court said to the jury that if the applicant did not know at what age her mother died, and did not state it, and declined to state it, and that her age was inserted by the agent upon statements made to him by others in answer to inquiries he made of them, and upon the strength of his own judgment, based upon data thus obtained, it was no defense to the action to show that the agent was mistaken.

The case, as reported, does not disclose that the plaintiff's testimony as to the way in which the untrue statement was put in the application was contradicted or denied by the company. It may therefore be presumed that the plaintiff's case, in that respect, was made out by undisputed evidence. And it would seem, such being the state of facts, that this court had reason to hold that the untrue statement was not made by the assured, and that it would operate as a fraud on the plaintiff if he were not permitted to show this fact, which was not a fact or statement contained in the policy sued on, but an extrinsic fact or statement contained in the application. The defense made upon that statement was, in legal effect a denial of the execution of the statement—a defense that can always be sustained by parol evidence.

However this may have been, we are unwilling to have the case regarded as one overthrowing a general rule of evidence. Some of the remarks contained in the opinion might seem to bear that interpretation, but not necessarily so. [30]

That Mr. Justice Miller did not intend, in the case of Union Mut. L. Ins. Co. v. Wilkinson, to lay down a new rule of evidence in insurance cases, is clearly shown in the subsequent case of Merchants' Mut. Ins. Co. v. Lyman, 15 Wall. 664, 21 L. Ed. 246, where the opinion was delivered by the same learned justice. [The quotation from this case, printed herein (ante, p. 314), is omitted.]

Eames v. Home Ins. Co., 94 U. S. 621, 24 L. Ed. 298, is another case relied on as showing that the general rule of evidence was not applicable in insurance cases. But that was the case of a bill in equity filed against an insurance company of New York to require said company to issue to the complainants a policy of insurance against loss or damage by fire, in pursuance of a contract for that purpose alleged to have been made with their agents in Illinois. It was made to appear that the terms of a contract for insurance upon property which was destroyed by fire before the policy was received had been agreed upon.

[30] "* * * The case of Union Mut. Life Ins. Co. v. Wilkinson, and the other cases in the Supreme Court of the United States along the same line, were 'distinguished' in name, but in fact were overruled, and the Wilkinson Case was almost in terms overruled." Hill, C. J., in People's Fire Ins. Ass'n v. Goyne, 79 Ark. 315, 96 S. W. 365, 16 L. R. A. (N. S.) 1180, 9 Ann. Cas. 373 (1906). The case just cited contains an interesting criticism of the principal case.

This agreement was manifested by an application signed by the complainant, and in several letters which had passed between the local agent and the general agent of the company, and between the complainant and the local agent. The report of the case states that there was an agreement as to certain facts by the attorneys in the cause, but what those facts were does not distinctly appear in the report. However, all that can be claimed for the case is that this court considered, from the agreement as to facts between the attorneys, and from the application and the several letters between the agents and the complainant, that a case was made out justifying a court of equity to decree that complainant was entitled to a policy of insurance to be issued for the amount and at the premium shown by the proofs. What was the scope of the authority of the agents who prepared the application and conducted the correspondence does not appear, but the court seems to have assumed that it sufficiently appeared that the agents had authority to act as they did. It is not perceived that this case has any valid application to the case now before us, beyond apparently holding, with Union Mut. L. Ins. Co. v. Wilkinson, in 13 Wall. 232, 20 L. Ed. 622, that it may be shown by parol that a statement which purports to have been made by an applicant for insurance was not, in point of fact, his statement, but was really that of the agent.[31] * * *

[31] Here are omitted extensive comments, with quotation, upon Knickerbocker Life Ins. Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689 (1877), ante, p. 496; Globe Mut. Life Ins. Co. v. Wolff, 95 U. S. 326, 24 L. Ed. 387 (1877); and New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934 (1886). The syllabus of the last case, as adopted by the court in the principal case, is as follows: "A person applied in St. Louis to an agent of a New York insurance company for insurance on his life. The agent, under general instructions, questioned him on subjects material to the risk. He made answers which, if correctly written down and transmitted to the company, would have probably caused it to decline the risk. The agent, without the knowledge of the applicant, wrote down false answers, concealing the truth, which were signed by the applicant without reading, and by the agent transmitted to the company, and the company thereupon assumed the risk. It was conditioned in the policy that the answers were part of it, and that no statement to the agent not thus transmitted should be binding on his principal; and a copy of the answers, with these conditions conspicuously printed upon it, accompanied the policy. Held, that the policy was void."

In the Fletcher Case the decision was to a great extent based upon a statement in the application that the rights of the insurer should not be affected by any statements made to or by the insurer's agents unless appearing in writing on the application. As said by Field, J. (117 U. S. 529, 6 Sup. Ct. 842, 29 L. Ed. 934 [1886]): "But the case as presented by the record is by no means as favorable to him as we have assumed. It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. But here the right is asserted to prove, not only that the assured did not make the statements contained in his an-

What, then, are the principles sustained by the authorities, and applicable to the case in hand? They may be briefly stated thus:

That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by nonobservance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown, either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent.

In the light of these principles, let us examine the contract that was made between the parties to the controversy before us. The contract was in writing, and in clear and unambiguous terms; that contract provided that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure, any other contract of

swers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by his verbal statements, or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed."

It should further be noted that the facts in the Fletcher Case justify a serious doubt as to the good faith of the insured.

insurance, whether valid or not, on property covered in whole or in part by this policy," and that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of the policy may be the subject of agreement indorsed hereon or added hereto, and, as to such provisions or conditions, no officer, agent, or representative shall have power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Such being the contract, and the property insured having been destroyed by fire on June 1, 1898, and the insurance company having denied liability because informed that other insurance was held by the insured on the same property, without the knowledge or consent of the company, this action was brought.

It is not pretended, as we understand the plaintiff's position, that by any language or declaration of the agent, at the time the policy was delivered and the premium paid, he claimed to have power to waive any provision or condition of the policy, nor that the plaintiff was induced to accept the policy by any promise of the agent to procure the assent of the company to permit the outstanding insurance and to waive the condition. The plaintiff's case stands solely on the proposition that because it is alleged, and the jury have found, that the agent had notice or knowledge of the existence of insurance existing in another company at the time the policy in suit was executed and accepted, and received the premium called for in the contract, thereby the insurance company is estopped from availing itself of the protection of the conditions contained in the policy. In other words, the contention is that an agent with no authority to dispense with or alter the conditions of the policy could confer such power upon himself by disregarding the limitations expressed in the contract, those limitations being according to all the authorities presumably known to be insured.

It was not shown that the company, when it received the premium, knew of the outstanding insurance, nor that, when made aware of such insurance, it elected to ratify the act of its agent in accepting the premium. On the contrary, all the record discloses is that the jury found that the agent knew, when the policy in the defendant company was issued and delivered to the plaintiff, that there was then subsisting fire insurance to the amount of $1,500 in another fire insurance company, and that such knowledge had been communicated to the agent by or on behalf of the assured. There is no finding that the agent communicated to the company or to its general agent at Chicago, at the time he accounted for the premium, the fact that there was existing insurance on the property, and that he had undertaken to waive the applicable condition. Indeed, it appears from the letter of defendant's

manager at Chicago, to whom the proofs of loss had been sent, which letter was put in evidence by the plaintiff and is set forth in the bill of exceptions, that the additional insurance held by the plaintiff was without the knowledge or consent of the company; and it further appears, and was found by the jury, that immediately on the company's being informed of the fact, the amount of the premium was tendered by the agents of the company to the insured. So that there is not the slightest ground for claiming that the insurance company, with knowledge of the facts, either accepted or retained the premium.

The plaintiff's case, at its best, is based on the alleged fact that the agent had been informed, at the time he delivered the policy and received the premium, that there was other insurance. The only way to avoid the defense and escape from the operation of the condition, is to hold that it is not competent for fire insurance companies to protect themselves by conditions of the kind contained in this policy. So to hold would, as we have seen, entirely subvert well-settled principles declared in the leading English and American cases, and particularly in those of this court.

This case is an illustration of the confusion and uncertainty which would be occasioned by permitting the introduction of parol evidence to modify written contracts, and by approving the conduct of agents and persons applying for insurance in disregarding the express limitations put upon the agents by the principal to be effected.

It should not escape observation that preserving written contracts from change or alteration by verbal testimony of what took place prior to and at the time the parties put their agreements into that form, is for the benefit of both parties. In the present case, if the witnesses on whom the plaintiff relied to prove notice to the agent had died, or had forgotten the circumstances, he would thus, if he had depended to prove his contract by evidence extrinsic to the written instrument, have found himself unable to do so. So, on the other side, if the agent had died, or his memory had failed, the defendant company might have been at the mercy of unscrupulous and interested witnesses. It is not an answer to say that such difficulties attend other transactions and negotiations, for it is the knowledge of the inconveniences that attend oral evidence that has led to the custom of putting important agreements in writing and to the legal doctrine that protects them when so expressed, and when no fraud or mutual mistake exists, from being changed or modified by the testimony of witnesses as to conversations and negotiations that may never have taken place, or the real nature and meaning of which may have faded from recollection.

Besides the importance of such considerations to the parties immediately concerned in business transactions, the community at large have a deep interest in the welfare and prosperity of such beneficial institutions as fire insurance companies. It would be very unfortunate if prudent men should be deterred from investing capital in such com-

panies by having reason to fear that conditions which have been found reasonable and necessary to put into policies to protect the companies from faithless agents and from dishonest insurers, are liable to be nullified by verdicts based on verbal testimony. Increased importance should be given to the rules involved in this discussion by the fact that, in later times and in most, if not all, of the states, statutory changes have opened the courts to the testimony of the very parties who have signed the written instrument in controversy.[32]

The judgment of the Circuit Court of Appeals is reversed. The judgment of the Circuit Court is likewise reversed, and the cause remitted to that court with directions to proceed in conformity with this opinion.[33]

The CHIEF JUSTICE, Mr. Justice HARLAN and Mr. Justice PECKHAM dissent.

[32] The principal case has been cited with approval in Penman v. St. Paul Fire & Marine Ins. Co., 216 U. S. 311, 30 Sup. Ct. 312, 54 L. Ed. 493 (1910), and Ætna Life Ins. Co. v. Moore, 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed. — (1913). And see, in accord, Thomas v. Commercial Union Ins. Co., 162 Mass. 29, 37 N. E. 672, 44 Am. St. Rep. 323 (1894); Batchelder v. Queen Ins. Co., 135 Mass. 449 (1883).

In following the rule laid down in the principal case Mr. Justice Hayes, speaking for the Supreme Court of Oklahoma, said: "This rule laid down by the Supreme Court of the United States in Northern Assurance Company v. Grand View Building Association, supra, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213 [1902], was a controlling decision upon the trial court in the case at bar; and, while we do not wish to be understood as saying that it is our opinion that the doctrine announced in that case is in harmony with the weight of authorities upon this question, or that it is supported by the better reasoning, yet on account of the fact that the rule announced in said case was the law controlling the courts in the Indian Territory at the time of the trial of the case at bar we are constrained to follow in this case the rule announced therein, and hold that the trial court did not err in refusing to permit the introduction of oral testimony to show the knowledge of the agent of the company of the existence of said mortgage at the time of the execution and delivery of the policy, and that said court did not err in holding that the forfeiting of said policy, if any had occurred, was not waived, and that the defendant company was not estopped from pleading the same as a defense by reason of the fact that the agent of the company who countersigned and delivered said policy had knowledge at the time of the existence of said mortgage. In applying the rule of law adopted by the Supreme Court of the United States in said case to the case at bar, and in following the same, we do not wish to be understood as laying down a rule by which this court shall be governed in the future in passing upon this same question arising in cases originating since the admission of the state of Oklahoma into the Union." Sullivan v. Mercantile Mutual Insurance Company, 20 Okl. 460, 94 Pac. 676, 129 Am. St. Rep. 761 (1908). This passage is quoted with approval in State Mutual Insurance Company v. Craig, 27 Okl. 90, 111 Pac. 325 (1910).

[33] The subsequent history of this case is interesting. In January, 1903, the insured after nearly five years spent in the unhappy effort to recover in an action at law on the policy, instituted in a Nebraska district court an equitable proceeding asking that the contract be reformed, and the defendant be compelled to pay under the contract as reformed. Having successfully avoided the defendant's pleas of res adjudicata and the statute of limitations, the plaintiff secured a favorable decree, which was affirmed by the Supreme Court of Nebraska in 1905. 73 Neb. 149, 102 N. W. 246. That court thus disposed of the defense of res adjudicata interposed by the defendant: "Is the judgment of the federal court res adjudicata, and an estop-

pel to the prosecution of this suit? We think that, so far as this jurisdiction is concerned, whatever may be the law elsewhere, this court has conclusively answered this question in the negative. When the plaintiff began the former action, it supposed, as is shown by testimony of its counsel preserved in the record, and, moreover, was bound to suppose, not only that an action at law on the contract, with pleading and proof of oral waiver of the stipulation for forfeiture, was a proper and adequate remedy for the recovery of its loss, but that, because it was so, a suit in equity to obtain a vain and unnecessary reformation of the contract would not lie. Insurance Co. v. Norwood, 69 Fed. 71, 16 C. C. A. 136 (1895); Home Fire Insurance Company v. Wood, 50 Neb. 386, 69 N. W. 941 (1896). The plaintiff began its action and prosecuted it to final judgment in reliance upon, and in strict conformity with, these decisions, the former of which was justified, as the court pronouncing it thought, by the opinion of the Supreme Court of the United States in Insurance Company v. Wilkinson, 13 Wall. 233, 20 L. Ed. 617 (1871). To say now that the plaintiff is estopped because it failed in the first instance to take its cause into a forum whose doors were, to all appearances, firmly and finally bolted and barred against it, would not fall short of a mockery of justice."

In commenting upon the decision in the principal case, the Nebraska Supreme Court seemed to show some resentment, judging from the somewhat unconventional language used: "From the final decision in the former action, four out of the nine Judges of the United States Supreme Court dissented. The opinion of the majority, being an adherence to the letter of an antiquated and worn-out technical formality, seems to us to be an ironical commentary upon the often-repeated judicial boast that the law is a progressive science, and that the courts are continually adapting their processes and proceedings to changing social and business needs and customs. Either so, or else, as we consider, the court fell into a still more grievous error. The familiar maxim that equity regards that as having been done which was agreed to be and ought in good conscience to have been done has not for a long time been a stranger in courts of law in cases in which equitable matters are properly in issue. It is admitted on all hands that the agent, Borgelt, had authority to bind his principal by executing the desired written stipulation for concurrent insurance. The greater includes the less. If he had power to enter into the covenant, he also had power to agree to enter into it. And if, for value, he made such an agreement, and, through fraud or mistake, failed to keep it, his failure is actionable both at law and in equity. It is upon such failure that this action is grounded. The parties did not waive written consent to concurrent insurance, or attempt so to do, but, on the contrary, agreed that it should be given. It is because of such agreement, and because such consent was mistakenly or accidentally omitted, that the plaintiff is entitled to have the contract reformed. Besides, the place where the contract was made, and where by its terms it was to be performed, and where the subject of it was situated, is in Nebraska. We are at a loss to understand why the laws of Nebraska, as expounded by the highest court of the state, are not conclusive of its obligatory force, and of its meaning and effect, if not of the remedy appropriate to its enforcement. It is another familiar and often quoted maxim that the law enters into and becomes an inseparable part of every contract. We desire to be told what law, other than that of Nebraska, became thus incorporated into the contract in suit."

The industrious defendant appealed from this judgment to the Supreme Court of the United States, claiming that the Nebraska court had not given full faith and credit to the former judgment of the federal court. But the Supreme Court gently refused to disturb the Nebraska judgment, saying that the plaintiff's "choice of law was not an election, but an hypothesis." This was in November, 1906. See 203 U. S. 106, 27 Sup. Ct. 27, 51 L. Ed. 109.

LEISEN v. ST. PAUL FIRE & MARINE INS. CO.

(Supreme Court of North Dakota, 1910. 20 N. D. 316, 127 N. W. 837, 30 L. R. A. [N. S.] 539.)

FISK, J. This is an action to recover on an insurance policy. The complaint is in the usual form, alleging: That in consideration of $51 paid by the plaintiff to defendant the latter issued its policy of insurance, a copy of which is annexed to and made a part of the complaint, whereby defendant insured the plaintiff against loss or damage by fire in the sum of $1,000 on a certain frame building situated on lots 9 and 10, block 21 of the village of Leonard, Cass county, for the term of one year from January 6, 1906. That plaintiff duly performed all of the terms of said contract of insurance on his part to be performed, and that on January 29, 1906, said building was totally destroyed by fire, which fire did not occur by reason of any of the causes enumerated in said policy exempting the insurance company from liability in case of fire or loss, and that plaintiff's loss by reason of such fire exceeded the sum of $1,500. That the destruction by fire as aforesaid was complete and the loss total, and that there was no disagreement between the plaintiff and defendant as to the amount of said loss, but that shortly after defendant was notified of the loss it denied any liability under the policy on the ground that plaintiff's title to the property insured was not truly stated in the policy or the application therefor.

Plaintiff, in his complaint, anticipates the defense that the policy never attached or became effective by reason of the fact that plaintiff's title to the property insured was not that of unconditional and sole ownership, etc., and in this respect alleges the following facts: "That at and during the said month of January, 1906, plaintiff was and still is the owner and holder of a certain sheriff's certificate of mortgage foreclosure sale of and upon the said frame building and the lot or parcel of land on which the same was situated, and at the time of the destruction of such building by fire hereinafter referred to, there was due and unpaid on the said certificate of mortgage foreclosure sale an amount exceeding the total amount of such insurance, and that at the time of the plaintiff's application for the insurance aforesaid, and at the time of the execution and delivery of the policy aforesaid, the plaintiff notified and informed the defendant company and its agent the nature and character of plaintiff's insurable interest in the frame building aforesaid, and that plaintiff was the owner and holder of a sheriff's certificate of mortgage foreclose sale as aforesaid, but the defendant and its said agent, though it then and there knew as aforesaid the character and extent of plaintiff's insurable interest in the frame building and premises aforesaid, carelessly and negligently stated and caused to be stated in the said policy of insurance and application therefor that plaintiff was the owner in fee simple of said premises

and the whole thereof, and thereby waived the conditions of said policy of insurance exempting the defendant company from liability in case the plaintiff's interest in the premises insured be not truly stated in such policy or in the application therefor."

The policy is the standard form adopted in this state, and contains, among others, the following stipulations: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein. * * * This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple. * * * This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

A demurrer was interposed to the complaint upon the ground that the complaint fails to state facts sufficient to constitute a cause of action. Such demurrer was overruled, and the appeal is from the order overruling the same.

In brief, appellant's contention on this appeal is that under the facts alleged in the complaint the policy is and was void at its inception for the reason that the interest of the insured was not that of "unconditional and sole ownership," and the nature and extent of his interest in the property was not stated in nor indorsed upon the policy. In other words, notwithstanding the fact that plaintiff, in applying for the insurance and at the time of the execution and delivery of the policy, expressly notified and informed defendant and its agent of the nature and character of his interest in the property, and that defendant with such notice and knowledge executed and delivered to plaintiff such policy and collected the premium thereunder, that defendant may, nevertheless, urge that such policy was void at its inception and no liability ever attached thereunder; that the doctrine of implied waiver and estoppel cannot be successfully invoked because the parties, by their contract, have otherwise stipulated, and the Legislature by statute, in effect, otherwise declared.

If appellant's contention be sound, the result would be most harsh

and inequitable. We cannot countenance such a doctrine unless imperatively required so to do by plainly established principles of law. We are entirely clear that we are confronted with no such situation. On the contrary, we are entirely clear that appellant's contention is without support on principle or reason and is contrary to the overwhelming weight of authority in this country. In support of this broad assertion, we proceed to give our reasons, but in the main shall adopt the reasoning of other courts upon the questions involved.

We will first notice the present status of the adjudications of this court and its predecessor, the territorial court, so far as material to the question here involved.[34]

As we shall hereafter see, the rule of the federal court as announced in Northern Assurance Co. v. Grand View Bldg. Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, is opposed to the decisions of nearly every state in the Union which has had occasion to pass upon the question, and to the extent that the opinion in Lamb v. Insurance Co. approves the rule thus announced by the federal court, the same is hereby disapproved.

We deem the correct rule to be as stated in the leading case of Wood v. Insurance Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733, as follows: "The restrictions inserted in the contract upon the power of the agent to waive any condition unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract, when it appears that the agent has delivered it and received the premiums with full knowledge of the actual situation. To take the benefit of a contract with full knowledge of all the facts and attempt afterwards to defeat it, when called upon to perform, by asserting conditions relating to those facts, would be to claim that no contract was made, and thus operate as a fraud upon the other party." That court in a later case also said: "The agent of a fire insurance company may, by issuing the policy with knowledge of the facts, waive a condition that the policy shall be void if the property insured be incumbered and the nature of the incumbrance be not indorsed on the policy, notwithstanding a provision in the policy that no agent of the company shall have power to waive any such conditions, except by written indorsement." Skinner v. Norman, 165 N. Y. 565, 59 N. E. 309, 80 Am. St. Rep. 776.

That the rule of the New York cases is supported by the overwhelming weight of authority must be conceded. We cite the following cases supporting the above rule: Welch v. Fire Ass'n of Phil., 120

[34] The court's careful consideration of the preceding Dakota cases is omitted. The fact that in Johnson v. Dakota Fire & Marine Ins. Co., 1 N. D. 167, 45 N. W. 799 (1890), the court had unequivocally approved the federal rule as announced in N. Y. Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934 (1886), proved somewhat embarrassing, as did the warm commendation of the opinion of the Supreme Court of the United States in Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213 (1902), found in Lamb v. Merchants' Nat. Ins. Co., 18 N. D. 253, 119 N. W. 1048 (1909).

Wis. 456, 98 N. W. 227; Home Ins. Co. v. Bank, 88 Tenn. 369, 12 S. W. 915; German Am. Ins. Co. v. Yeagley, 163 Ind. 651, 71 N. E. 897, 2 Ann. Cas. 275; King v. Insurance Co., 72 Iowa, 310, 33 N. W. 690; McGonigle v. Insurance Co., 168 Pa. 1, 31 Atl. 868; Continental Fire Ass'n v. Norris, 30 Tex. Civ. App. 299, 70 S. W. 769; Continental Ins. Co. v. Brooks, 131 Ala. 614, 30 South. 876; Insurance Co. v. Flemming, 65 Ark. 54, 44 S. W. 464, 39 L. R. A. 789, 67 Am. St. Rep. 900; Rhode Island Underwriters' Ass'n v. Monarch, 98 Ky. 305, 32 S. W. 959; Hartford Fire Ins. Co. v. Keating, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499; Improved-Match Co. v. Insurance Co., 122 Mich. 256, 80 N. W. 1088; Home Ins. Co. v. Gibson, 72 Miss. 58, 17 South. 13; Flournoy v. Insurance Co., 80 Mo. App. 655; Parsons v. Insurance Co., 132 Mo. 583, 31 S. W. 117, affirmed in bank 132 Mo. 583, 34 S. W. 476; Benjamin v. Insurance Co., 80 App. Div. 260, 80 N. Y. Supp. 256, affirmed in 177 N. Y. 588, 70 N. E. 1095; Grabbs v. Insurance Co., 125 N. C. 389, 34 S. E. 503; Gould v. Insurance Co., 134 Pa. 570, 19 Atl. 793, 19 Am. St. Rep. 717; Gandy v. Insurance Co., 52 S. C. 224, 29 S. E. 655; Virginia, etc., Ins. Co. v. Richmond Mica Co., 102 Va. 429, 46 S. E. 463, 102 Am. St. Rep. 846; Wagner v. Insurance Co., 92 Tex. 549, 50 S. W. 569; Bartlett v. Fireman's Ins. Co., 77 Iowa, 155, 41 N. W. 601; Medley v. Insurance Co., 55 W. Va. 342, 47 S. E. 101, 2 Ann. Cas. 99; Orient Ins. Co. v. McKnight, 197 Ill. 190, 64 N. E. 339; German Ins. Co. v. Shader, 68 Neb. 1, 93 N. W. 972, 60 L. R. A. 918; Grand View Bldg. Ass'n v. Northern Assurance Co., 73 Neb. 149, 102 N. W. 246.

Many of the foregoing cases were decided since the Supreme Court of the United States handed down the Northern Assurance Company decision, and they expressly disapprove the same.[35] * * *

In addition to the foregoing authorities, we cite the following very recent cases holding to the same effect: Fosmark v. Equitable Fire Association, 23 S. D. 102, 120 N. W. 777; O'Neill v. Northern Assurance Co., 155 Mich. 564, 119 N. W. 911; Sharp v. Insurance Co., 136 Cal. 542, 69 Pac. 253, 615; Allen v. Insurance Co., 133 Cal. 29, 65 Pac. 138; Loring v. Insurance Co., 1 Cal. App. 186, 81 Pac. 1025; Insurance Co. v. Price (decided in 1909) 132 Ga. 687, 64 S. E. 1074; Wisotzkey v. Insurance Co., 112 App. Div. 599, 98 N. Y. Supp. 760; Plunkett v. Insurance Co., 80 S. C. 407, 61 S. E. 893; Westchester Fire Ins. Co. v. Ocean View Pier Co., 106 Va. 633, 56 S. E. 584; Glens Falls Ins. Co. v. Michael, 167 Ind. 659, 74 N. E. 964, 8 L. R. A. (N. S.) 708; People v. Goyne, 79 Ark. 315, 96 S. W. 365, 16 L. R. A. (N. S.) 1180, 9 Ann. Cas. 373; House v. Insurance Co., 145 Iowa, 462, 121 N. W. 509; Capital Fire Ins. Co. v. Montgomery, 81 Ark. 508, 99 S. W. 687; Parsons v. Lane, 97 Minn. 98, 106 N. W. 485, 4 L. R. A. (N. S.) 231, 17 Ann. Cas. 1144; 19 Cyc. 812–814,

[35] A quotation from Welch v. Fire Ass'n, 120 Wis. 456, 98 N. W. 227 (1904), ante, p. 481, is omitted.

and cases cited; 16 Am. & Eng. Encyc. of L. (2d Ed.) 949; 3 Cooley's Briefs on the Law of Ins. 2650–2655; Clement, Fire Ins. 418; Ostrander on Fire Ins. § 265; Vance on Ins. pp. 304, 305.

In speaking on the question of waiver or estoppel under facts here involved, Mr. Vance says: "Issue and delivery of a policy with knowledge by the company or its agent of existing facts which by its terms or conditions would render it void operates as a waiver or estoppel preventing the company from claiming a forfeiture by reason of such facts. By the weight of authority this is true, although the policy contains the usual limitation upon the agent's authority." Ostrander says: "When a person is employed to solicit risks and take applications to be forwarded to the company for approval, but has no authority to make a complete or binding contract of insurance, and has never been held out by his principal as having such power, he cannot waive any condition or requirement of the policy. It has, however, often been held that the soliciting agent is competent to do certain things in respect to his distinctive duties that will create estoppel. Any knowledge communicated to him in regard to the risks he solicits at the time of such solicitation will be imputed to the company. If the facts imparted to the solicitor are of such a character as under the terms of the policy will cause an avoidance, unless disclosed, such as other insurance, defective title, incumbrances, etc., and such facts are by him withheld from the company, the latter will be estopped from insisting on the failure of the insured to give the required notice as a defense to an action on the policy." Vance says: "Again, a second incident of the relation of principal and agent is that any information material to the transaction, either possessed by the agent at the time of the transaction or acquired by him before its completion, is deemed to be the knowledge of the principal, as least so far as that transaction is concerned, even though in fact the knowledge is not communicated to the principal at all. It is here to be observed, and the importance of the principle is so great that it cannot be too strongly emphasized, that these incidents of agency are created by law and not by the parties. The insurer is charged with the knowledge acquired by his agent in making or negotiating a contract of insurance, not because he has consented to be so charged, nor because he has authorized his agent so to bind him, but because, as a legal consequence of the relation he sustains to the agent, the latter's knowledge is imputed to him. It therefore follows that this incident, created by the law in response to the demand of public policy, irrespective of agreement, cannot be destroyed or altered by the agreement of the parties. The parties cannot, by their contract, contravene the policy of the law in this instance, any more than the husband, by contract, can escape his duty to support the wife, or the carrier can by contract exempt himself from liability for his negligent failure to carry safely his passenger. Those cases which ignore this principle and regard

these legal incidents as powers conferred and subject to limitation are much to be deplored."

By the issuance and delivery of the policy and the acceptance of the premium with knowledge of the existing facts relative to plaintiff's interest in the property, the company, in effect, said to the plaintiff that, "notwithstanding the stipulations and conditions in the policy to the contrary, we will treat the same as a valid and binding contract of indemnity." In other words, "We agree not to urge such conditions or stipulations to defeat such policy in the event plaintiff shall assert any rights thereunder." The company thereby, in effect, said to plaintiff: "The policy is a valid policy of insurance." It would seem, therefore, on the plainest principles of equity and good conscience, that the company should be estopped by such conduct to assert the contrary. As said 32 years ago by Justice Walker of the Illinois Supreme Court: "This information given to the agent operated as notice to the company, and, it having accepted the premium and assumed the risk, it must be held that the company has waived the condition, or, if not, it is estopped from urging its breach as a defense. To permit such a defense would be highly unjust and iniquitous. It would shock the sense of right and fair dealing to permit money to be obtained under such assurances, and to permit the company to say: 'We are not bound, and did not intend, on our part, to be bound, for any loss that might occur. We misled and deceived you into paying the premium, and although we did not intend to be bound, and knew we were not, still we will keep the premium, and you must suffer the loss.' This is the substance of the defense, and such a defense cannot be allowed to prevail." St. Paul Fire & Marine Ins. Co. v. Wells, 89 Ill. 82.

Appellant's counsel lays stress upon the fact that this is a standard policy prescribed by statute, and that the courts are therefore bound to give it effect. Such argument has repeatedly been made and as often repudiated by the courts as unsound. It is firmly established that a form of policy of fire insurance, although prescribed by law, is, when issued by the insurance company, none the less a contract and to be construed as such by the courts, and that, while it may affect a question of pure waiver, it does not abrogate the doctrine of estoppel. In addition to the foregoing authorities, see Clement on Fire Insurance, pp. 409, 451, and cases cited. Moreover, such rule is crystallized by statute in this state. Section 6058, Rev. Codes 1905, provides: "Policies of insurance in the form prescribed by the last section shall be in all respects subject to the same rules of construction as to their effect or the waiver of any of their provisions as if the form thereof had not been prescribed."

It is urged that by receiving and retaining the policy plaintiff is conclusively deemed to have acquiesced in and agreed to its terms. Such contention has the support of many authorities and no doubt is sound when properly applied. Aside from the case of Northern

Assurance Company v. Grand View Building Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, and the few other authorities adhering to the rule there announced, it is firmly settled that restrictions in a policy on the power of agents with respect to waiver have no application to those conditions relating to the inception of the contract. 3 Cooley's Brief on the Law of Insurance, pp. 2510, 2511. Mr. Cooley states the reason for this doctrine to be that: "The insured is not bound by restrictions and stipulations of which he has no knowledge. As an insurer cannot be charged with constructive notice of the stipulations in a policy until he has accepted it, therefore a limitation in a policy on an agent's authority will not bind the insured with reference to matters occurring prior thereto. Until an insured has either actual or constructive notice of the limitations on an agent's authority, he may assume that the agent has the authority indicated by the apparent scope of his employment." At page 3619 the same author says: "Unquestionably, the weight of authority supports the doctrine that an insured cannot rely on waivers by parol prior to the issuing of a policy. But this rule does not apply to implied waiver by the issuance of a policy, and receipt of the premiums thereon, with knowledge of matters vitiating the policy at its inception; for a large majority of the cases, especially the more recent ones, support the rule that an insurance company will not be permitted to defeat a recovery upon a policy issued by it by proving the existence of facts which would render it void, where it had full knowledge of it when the policy was issued." As said by the Georgia court in Insurance Company v. Carrugi, 41 Ga. 660: "It would be a fraud to take a man's money, with a full knowledge of the facts, and then set up that a particular mode of proving the fact, agreed upon by the parties, but not required by law had not been resorted to. The receipt of the money and the issuing of the policy is a waiver of the indorsement; even if it be admitted that parties may, by their contract, agree as to how any particular fact shall be proven." And in Insurance Company v. Brodie, 52 Ark 11, 11 S. W. 1016, 4 L. R. A. 458, the court said: "The issue of a policy by an insurance company with a full knowledge or notice of all the facts affecting its validity is tantamount to an assertion that the policy is valid at the time of its delivery and is a waiver of the known ground of invalidity." See, also, 3 Cooley on Ins. pp. 2632, 2652, and authorities cited.

Of course, in order to successfully invoke the doctrine of estoppel against the insurer as above stated, the insured must be devoid of any taint of fraud on his part. If there is any collusion between him and the insurance company's agent, he cannot invoke the doctrine of implied waiver or estoppel.[36] If, however, the insured in good faith informs the agent of the actual facts regarding the property insured

[36] See Mudge v. Supreme Court I. O. F., 149 Mich. 467, 112 N. W. 1130, 14 L. R. A. (N. S.) 279, 119 Am. St. Rep. 686 (1907), post, p. 567, and note.

and makes truthful answers to the questions asked him by such agent, we know of no sound reason why the insurance company should be permitted, in a court of law, to urge in avoidance of the policy that answers or representations inserted in the application or policy by the agent, either through mistake, carelessness, or fraud, avoid such policy and exonerate the company from all liability thereunder. The few courts holding to the contrary base their decisions upon the untenable ground that to permit plaintiff to prove facts contrary to the written statements in the application and policy would violate the rule against the admission of parol testimony tending to vary the written contract. But, as will be seen by the foregoing authorities, the courts, with but a few exceptions, hold "that to apply the doctrine as to parol testimony with the strictness demanded by the insurer would be to make a rule of evidence adopted as a protection against fraud an instrument of the very fraud it was intended to prevent." 3 Cooley on Insurance, 2565, 2566, and cases cited.

For a correct statement of the rule regarding the subjects of waiver and estoppel as applied to the standard form of policy such as the one in the case at bar, see Clement on Fire Ins., pp. 405, 448, and cases cited. At pages 415 and 416 the rule is stated as follows: "The stipulation in a policy that no agent or other representative shall have power to waive any condition may be effective as against an alleged waiver by agreement or contract with an agent or representative, but has no application when the law declares a waiver by estoppel because of the acts of the company through its agent or representative. Such estoppels do not rest upon the power or lack of power of the agent to change the provisions of the policy or waive any of its agreements, but arise in law because of the acts of the company through its agent acting in the scope of his apparent power as its representative. Restrictions in the policy upon power of agents to waive its conditions, unless done in a particular manner, do not apply to those conditions which relate to the inception of the contract when it appears that company's agent delivered it and received the premium with full knowledge of the actual situation."

The above rule is supported by the great weight of authority. We shall not attempt here to cite the many cases. They are collated in the opinion of Mr. Justice Corson in the recent case from South Dakota. Fosmark v. Equitable Fire Ass'n, 23 S. D. 102, 120 N. W. 777. Particular attention is called to the case of People's Fire Ins. Ass'n v. Goyne, 79 Ark. 315, 96 S. W. 365, 16 L. R. A. (N. S.) 1180, 9 Ann. Cas. 373, from which we quote the following: "A fire insurance company may be estopped by the conduct of its agent, acting within the apparent scope of his authority, from availing itself of a false answer to a material question, or of a breach of warranty, or of a violation of the provisions of the application or policy, notwithstanding clauses in the application or policy to the effect that the company shall not be bound by any such conduct or representaton of its agent;

and such estoppel or waiver may be proved by parol evidence, though the policy or application contains clauses to the effect that no waiver shall be effective unless indorsed in writing on the policy at the home office of the company."

Appellant's counsel strenuously contends, in effect, that by force of certain statutory provisions in this state the rule of implied waiver or estoppel cannot be invoked. The particular sections of the statute relied on are sections 5952 to 5956 and 5960 and 5961, Rev. Codes 1905. These sections merely deal with the subject of warranties in relation to insurance contracts and the effect of a breach thereof. It is a sufficient answer to such contention to say that in our opinion it was not the legislative intent, by the enactment thereof, to do away with the well-settled and most equitable rule of implied waiver and estoppel in pais. It is inconceivable that it could have been the legislative intent to enable insurance companies, in effect, to take advantage of their own mistakes, carelessness, or fraud, or that of their agents; in other words, to repudiate all liability on account of a state of facts, involving misrepresentations, for which the company or its agent is alone to blame. Although like statutory provisions exist in California and South Dakota, the decisions in those states do not support counsel's contention. On the contrary, the courts of both states most emphatically recognize and enforce the doctrine of implied waiver and estoppel as announced so generally by nearly all courts in this country.

Counsel's criticism of certain of the New York cases shows that he apparently fails to distinguish between a waiver and an estoppel, and also fails to distinguish between conditions or warranties which are precedent and those which are subsequent to the formation of the contract.

Our conclusion leads to an affirmance of the order appealed from. All concur, except SPALDING, J., dissenting. [37]

[37] The dissenting opinion of Spalding, J., is omitted. In addition to the authorities cited in the principal case as expressly disapproving Northern Assurance Co. v. Grand View Building Association, supra, may be added Pearlstine v. Phœnix Ins. Co., 74 S. C. 246, 54 S. E. 372 (1906).

SECTION 5.—WAIVER AND ESTOPPEL, AS AFFECTED BY LIMITATIONS UPON THE AUTHORITY OF THE AGENT

KAUSAL v. MINNESOTA FARMERS' MUT. FIRE INS. ASS'N.

(Supreme Court of Minnesota, 1883. 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776.)

Appeal from an order of the district court, Hennepin county.

MITCHELL, J. 1. On principle, as well as from considerations of public policy, agents of insurance companies authorized to procure applications for insurance, and to forward them to the companies for acceptance, must be deemed the agents of the insurers and not of the insured in all that they do in preparing the applications, or in any representations they may make to the insured as to the character or effect of the statements therein contained. This rule is rendered necessary by the manner in which business is now usually done by the insurers. They supply these agents with printed blanks, stimulate them by the promise of liberal commissions, and then send them abroad in the community to solicit insurance. The companies employ them for that purpose, and the public regard them as the agents of the companies in the matter of preparing and filling up these applications,—a fact which the companies perfectly understand. The parties who are induced by these agents to make applications for insurance rarely know anything about the general officers of the company, or its constitution and by-laws, but look to the agent as its full and complete representative in all that is said or done in regard to the application. And in view of the apparent authority with which the companies clothe these solicitors, they have a perfect right to consider them such. Hence, where an agent to procure and forward applications for insurance, either by his direction or direct act, makes out an application incorrectly, notwithstanding all the facts are correctly stated to him by the applicant, the error is chargeable to the insurer and not to the insured. Ins. Co. v. Mahone, 21 Wall. 152, 22 L. Ed. 593; Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617; Malleable Iron Works v. Ins. Co., 25 Conn. 465; Hough v. Ins. Co., 29 Conn. 10, 76 Am. Dec. 581; Woodbury Savings Bank, etc., Ass'n v. Ins. Co., 31 Conn. 517; Miner v. Ins. Co., 27 Wis. 693, 9 Am. Rep. 479; Winans v. Ins. Co., 38 Wis. 342; Rowley v. Ins. Co., 36 N. Y. 550; Brandup v. Ins. Co., 27 Minn. 393, 7 N. W. 735; 2 Amer. Lead. Cas. (5th Ed.) 917 et seq; Wood, Ins. c. 12; May, Ins. § 120.

2. After the courts had generally established this doctrine, many of the insurance companies, in order to obviate it, adopted the ingenious device of inserting a provision in the policy that the application, by whomsoever made, whether by the agent of the company or any other person, shall be deemed the act of the insured and not of the insurer. But, as has been well remarked by another court, "there is no magic in mere words to change the real into the unreal. A device of words cannot be imposed upon a court in place of an actuality of fact." If corporations are astute in contriving such provisions, courts will take care that they shall not be used as instruments of fraud or injustice. It would be a stretch of legal principles to hold that a person dealing with an agent, apparently clothed with authority to act for his principal in the matter in hand, could be affected by notice, given after the negotiations were completed, that the party with whom he had dealt should be deemed transformed from the agent of one party into the agent of the other. To be efficacious, such notice should be given before the negotiations are completed. The application precedes the policy, and the insured cannot be presumed to know that any such provision will be inserted in the latter. To hold that by a stipulation, unknown to the insured at the time he made the application, and when he relied upon the fact that the agent was acting for the company, he could be held responsible for the mistakes of such agent, would be to impose burdens upon the insured which he never anticipated. Hence we think that if the agent was the agent of the company in the matter of making out and receiving the application, he cannot be converted into the agent of the insured by merely calling him such in the policy subsequently issued. Neither can any mere form of words wipe out the fact that the insured truthfully informed the insurer, through its agent, of all matters pertaining to the application at the time it was made. We are aware that in so holding we are placing ourselves in conflict with the views of some eminent courts. But the conclusion we have reached is not without authority to sustain it, and is, as we believe, sound in principle, and in accordance with public policy. Wood, Ins. § 139; May, Ins. § 140; Com. Ins. Co. v. Ives, 56 Ill. 402; Gans v. St. Paul F. & M. Ins. Co., 43 Wis. 108, 28 Am. Rep. 535; Columbia Ins. Co. v. Cooper, 50 Pa. 331.

3. It is contended by respondent that there is a distinction in this regard between "stock" and "mutual" insurance companies; that the difference in the character of the companies makes a difference in the relative duties of the applicant and the company, and the authority of the agents employed; that in the case of a mutual company the application is in effect not merely for insurance, but for admission to membership,—the applicant himself becoming a member of the company upon the issue of the policy.

By some courts a distinction in this respect is made between the two classes of companies. This distinction is usually based upon the ground that the stipulations held binding upon the insured are contained in the charter or by-laws of the company, and that a person applying for membership is conclusively bound by the terms of such charter and by-laws. Such is not this case, for the stipulations claimed to bind the insured are only in the policy. But, so far as concerns the questions now under consideration, we fail to see any distinction between the two kinds of companies, and we feel confident that the average applicant for insurance is rarely aware of any. It is true that in the case of a mutual company the insured becomes in theory a member of the company upon the issue of the policy. But in applying and contracting for insurance the applicant and the company are as much two distinct persons as in the case of a stock company, and we see no reason for holding the agent who takes the application any less the agent of the insurer in the one case than in the other. The membership does not begin until the policy is issued. As to all previous negotiations the agent acts only for the company. Columbia Ins. Co. v. Cooper, supra; May, Ins. § 139 et seq.[38]

[38] AGENT TAKING APPLICATION AGENT OF INSURER.—By the weight of authority an agent of the insurer who fills out and receives the application of the insured is the insurer's agent, so that the insurer is charged with knowledge acquired by the agent and may be estopped thereby. See Continental Life Ins. Co. v. Pearce, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557 (1888); American Life Ins. Co. v. Mahone, 21 Wall. 152, 22 L. Ed. 593 (1874); Deitz v. Insurance Co., 31 W. Va. 851, 8 S. E. 616, 13 Am. St. Rep. 909 (1888); Grattan v. Insurance Co., 80 N. Y. 281, 36 Am. Rep. 617 (1880); Germania Fire Ins. Co. v. Hick, 125 Ill. 361, 17 N. E. 792, 8 Am. St. Rep. 384 (1888); Hagan v. Insurance Co., 81 Iowa, 321, 46 N. W. 1114, 25 Am. St. Rep. 493 (1890). Contra: Reed v. Insurance Co., 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496 (1892); Biggar v. Rock Life Assurance Co., [1902] 1 K. B. 516, apparently contra to the previous cases of Bawden v. London, Edinburgh & Glasgow Assur. Co., [1892] 2 Q. B. 534, and In re Universal Non-Tariff Fire Assur. Co., L. R. 19 Eq. 485 (1873). It is also generally held that even a stipulation in the policy or application that the one making out the application shall be the agent of the insured is not sufficient to alter his character when he is in fact the agent of the insurer. See Sternaman v. Metropolitan Life Ins. Co., 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625 (1902); Howe v. Provident Fund Soc., 7 Ind. App. 586, 34 N. E. 830 (1903); Robinson v. U. S. Benevolent Society, 132 Mich. 695, 94 N. W. 211, 102 Am. St. Rep. 436 (1903); Royal Neighbors of America v. Boman, 177 Ill. 27, 52 N. E. 264, 69 Am. St. Rep. 201 (1898); Endowment Rank K. of P. v. Cogbill, 99 Tenn. 28, 41 S. W. 340 (1897); Knights of Pythias v. Withers, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762 (1900). Contra: Masonic Life Ass'n v. Robinson, 149 Ky. 80, 147 S. W. 882, 41 L. R. A. (N. S.) 505 (1912).

The case of Sternaman v. Metropolitan Life Ins. Co., supra, substantially overruled the rule of Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451 (1875). In this case it was said by Folger, J.: "It is hereupon urged by the plaintiff that the errors and omissions were those of the defendant. But the plaintiff and defendant have, in the policy, the contract between them, expressly agreed that Brand should be deemed the agent of the plaintiff and not of the defendant, under any circumstances whatever. * * * I am aware that often the companies are made the victims of dishonest and designing persons, but I cannot agree that the remedy for that

4. Verbal testimony is competent to show that the application was filled up by the agent of the company, and that the facts were fully and correctly stated to him, but that he, without the knowledge of the insured, misstated them in the application. This was not in violation of the rule that verbal testimony is not admissible to vary a written contract. It proceeds upon the ground that the contents of the paper was not his statement, though signed by him, and that the insured company, by the acts of their agent in the matter, are estopped to set up that it is the representation of the insured. Insurance Co. v. Wilkinson, supra; May, Ins. § 143, and cases cited, note 3.

5. It appears that the property covered by the policy was the several property of William Kausal whereas the policy is a joint one to him and his wife, as if upon the joint property of the two. On this ground it is claimed that there can be no recovery, because a joint policy to two does not cover the several property of either. Had plaintiff taken out this policy without disclosing the real nature of their interest in the property, there might be something in this suggestion. But according to the offers of plaintiffs, which must here be taken as the facts, the wife was the owner of an undivided three-fourths, and in the actual possession of the whole of the land upon which the house and other personal property covered by the policy was situate. The husband erected the house with his own money, under a license from and an agreement with his wife that he might do so, and should have the right to remove it at pleasure. At the time the application for insurance was made, defendant's agent, authorized to take such applications, was personally present on the premises, and was first fully informed by the plaintiffs of all these facts, and then himself wrote out the application, and told William Kausal that it was correct; that William Kausal then signed it, and also signed his wife's name thereto, upon the statement and representation of the agent that

is to refuse to be bound by the acts of agents of their own selection when dealing with simple and unlettered men. If there should be less greediness for business, and such care in the selection and appointment of agents as would insure the confidence of the companies in their capability, discretion and integrity, it would not need that there be laid upon unwise policy-holders an agreement to take the burden of the opposite qualities in those put forward to them as actors for the insurers. But we must take the contracts of the parties as we find them, and enforce them as they read. By the one before us the plaintiff has no fettered himself as to be unable to retain, as the case now stands, the real essence of his agreement. Though he has frankly and fully laid before the actor between him and the defendant all the facts and circumstances of the case, he is made responsible for error in legal conclusions which he never formed, and which were arrived at by one in whom he trusted and whom he supposed to stand in the place of the defendant."

In many states statutes declare that the agent taking the application shall be deemed the agent of the insurer and not of the insured. See Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 10 Sup. Ct. 87, 33 L. Ed. 341 (1889), construing the Iowa statute. See other cases in note, 107 Am. St. Rep. 124. See Vance on Insurance, 330; 41 L. R. A. (N. S.) 505, note.

such was the proper mode of making the application. In short, it appears that the agent, after being informed that it was the individual property of the husband, although situated on the land of the wife, directed the making of a joint application, and upon such application the defendant issued a joint policy, insuring the two against loss by the destruction of the property by fire, and that the plaintiffs, relying upon the representations of the agent that this was, under the circumstances, the proper course, made the application in this form, and accepted the joint policy.

On this state of facts, if the policy does not cover the loss it is the fault of the defendant and not of the plaintiff. It seems clear that plaintiffs are not without remedy. We are not prepared to say that William Kausal alone might not have maintained an action, at least upon asking to have the policy reformed; but we see no good reason why, under the facts of this case, the two plaintiffs to whom the policy was issued cannot maintain a joint action. The policy is not a wagering policy, because, between the two plaintiffs, title to the whole of the property was in the beneficiaries to whom the policy ran, and it can make no difference to the defendant in what way their interests are apportioned, or whether it all belongs to one. It brings in no new party to the contract; and by issuing the policy to the two, the defendant admits that both are proper persons to insure. It was entirely competent for all parties to treat this as joint property for the purposes of insurance, and that the loss, if any, should be payable to the two plaintiffs. This is, in effect, just what they have done, and what defendant not only assented to, but advised and directed. If the husband, who owned the property, assented to this, and if the defendant, with full knowledge of all the facts, agreed to it, we fail to see what principle, either of law or justice, is violated by enforcing the contract just as the parties have made it. Peck v. New London Co. Mut. Ins. Co., 22 Conn. 575; Castner v. Farmers' Mut. Ins. Co., 46 Mich. 15, 8 N. W. 554.

Order reversed.

PFIESTER v. MISSOURI STATE LIFE INS. CO.

(Supreme Court of Kansas, 1911. 85 Kan. 97, 116 Pac. 245.)

Action by Adam Pfiester against the Missouri State Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

BURCH, J. The defendant issued a policy of insurance on the life of Jacob Pfiester, payable to the plaintiff, Adam Pfiester. The application was taken on June 14, 1907, by an agent whose written authority was limited to negotiating for applications, transmitting applications to the defendant for approval or rejection,

and collecting the initial premium. The application was signed by the insured, and he asked that the policy be dated May 5th. It was provided that no statements or answers made to or received by any person, or to the company, should be binding on the company, unless such statements or answers were reduced to writing and made a part of the application. It also provided that the application and policy when issued should constitute the entire contract, which could be varied only by the president or secretary of the company, in writing. It further provided as follows: "That the insurance hereby applied for shall not take effect unless the premium is paid and the policy delivered to and accepted by me during my lifetime and good health, and that then the first insurance or policy year shall end on the first anniversary of the date of this application, or, in any event, on such date as may be fixed by the company in the policy."

The premium for the first policy year was paid when the application was taken. The policy which was issued was dated June 26, 1907. It fixed the first policy year as ending on May 4, 1908, and provided that it would be continued in force on the payment of the annual premium on the 4th of May in each year, with a grace period of 30 days after the due date. When the application was taken, it was agreed between the defendant's agent and the insured that annual premiums should be paid on June 14th, the anniversary of the application, with a grace period of 30 days following the due date. Through the agent's oversight or fault, the agreement was not inserted in the application, or otherwise submitted to the defendant. The premium for 1908 was paid on June 12th. The insured died on June 19th, and the policy was found among his effects. The defendant denied liability, because the premium for 1908 was not paid within 30 days after May 4th. The beneficiary, as plaintiff, brought an action to reform the policy according to the agreement, and to recover upon the policy as reformed.

The plaintiff gave the following account of the negotiations with the defendant's agent: "He went ahead then and told us about what a good company it was and all, and led us up to the present time, and told us about the standing of the company that he represented, and tried to persuade my brother to take out insurance. * * * He told about the company, and then wanted to insure, and then my brother said that he could not take this policy out, and he asked me if I would not take it out for my brother, and we went ahead and talked, and I says to him, 'I am not in any shape to take this out, unless you make this policy so I can pay it after harvest,' and he said, 'all right; we can fix it.' He says the company allows 30 days; that was June 14th. He says they allow 30 days on their policy. 'Well,' I says, 'if you can fix it like that—if I pay you for this policy—it will be

due June 14th, a year?' 'Yes,' he said, 'would be due June 14th, a year.'" Under these circumstances the insurance was taken.

The agent explained why the policy was dated back as follows: "In the first discussion of insurance, Jacob Pfiester gave his age as 30 years, and in the course of our discussion of the insurance I, of course asked him the month of his birth, and, finding out the month of his birth, I saw he had passed the six-months dividing line, so called by insurance agents. I explained to him then that we could make a request to the company to date back the policy to May 5th, and give him the rate at 30, his last birthday, and therefore that would give him a lower rate, and would mature the policy that much earlier at the end of 20 years." The agent further testified that it was customary to date policies back 30 or 60 days.

Judgment was rendered for the plaintiff, and the defendant appeals.

The contention of the defendant is that the evidence of the plaintiff relating to the date upon which premiums were to become due was incompetent, because it tended to contradict the written contract. The first purpose which the plaintiff sought to accomplish was the reformation of the contract. Insurance contracts are the subject of reformation the same as any other kind, and in all suits for reformation the true contract may be established by parol evidence, whenever it is the result of oral negotiations. These principles are elementary. The defendant argues further, however, that, since its agent's authority was limited to the taking and transmittal of applications, he could not make a binding contract that premiums should fall due on June 14th; that no application requesting that premiums fall due on that date was ever submitted to or approved by the defendant, and consequently that the judgment of the court in effect makes a contract, instead of reforms one.

There are two principal lines of decisions on the subject indicated, with a third inclining now toward one and now toward the other. According to one view, the applicant and the insurer are treated as if the negotiations were of ordinary bargain and sale, in a field where both stand on the same footing. The applicant frames and signs, upon his own judgment and at his own risk, an order or request for an article called a policy. This order is taken and transmitted by an intermediary commissioned, equipped, and paid by the insurer, but the insurer may by force of mere words destroy the relation of agency between itself and the intermediary, and cast all the consequences of his mistakes and misfeasances upon the applicant. Upon receipt of the order, the insurer fills it by forwarding an elaborate and intricate document, which the applicant takes according to the rule of caveat emptor. If the

terms of the policy do not correspond to the application, a new proposition is tendered, which the applicant must detect, scrutinize, and reject, or forever hold his peace. At every step the applicant is held rigorously to the maxim, "Vigilantibus et non dormientibus jura subveniunt." Meanwhile the insurer has the applicant's money.

The other principal theory of the formation of the insurance contract is based upon facts. Everybody knows what the facts are. The insurance company sends out its agents for the purpose of procuring insurance. They are usually experts in the business, and are frequently paid large bonuses for securing extra large volumes of insurance. Few persons solicited to take policies understand the subject of insurance or the rules of law governing the negotiations, and they have no voice in dictating the terms of what is called the contract. They are clear upon two or three points which the agent promises to protect, and for everything else they must sign ready-made applications and accept ready-made policies carefully concocted to conserve the interests of the company. The agent in fact prepares the contract when he writes the application, because the policy, which the applicant does not see until delivered and does not sign, follows an acceptance of the application as a matter of course. In writing the application, the agent does what the company sent him out to do. He negotiates for the company, asks questions for the company, writes down answers for the company, and makes the return for the company. It is not carelessness or imprudence in fact, as people in general understand those terms, for the applicant to take it for granted that the agent will accurately and truthfully set down the result of the negotiations. If he fail to do so, good sense and common justice regard the company as responsible, and not the insurer. The subject, therefore, is sui generis, and the rules of a legal system devised to govern the formation of ordinary contracts between man and man cannot be mechanically applied to it. It is not necessary to review the decisions in which the foregoing conflicting views are maintained. This court favors the one which is least artificial and best conforms to the facts.

In the case of Continental Ins. Co. v. Pearce, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557, the opinion reads: "In taking this application for insurance, was J. A. Beals the agent of plaintiff or of defendant? It is claimed that by reason of the stipulation on its face, which provided that all statements, answers and descriptions were the acts of the plaintiff, that whatever part Beals may have taken in making and filling it out was as his agent. It must be conceded that plaintiff did not seek Beals for this work; did not even ask him to do it, and paid him nothing therefor; did not even suspect that at that time he was his agent, but did believe that he was an insurance agent, looking after the interests of the

company whose advantages he was advocating to plaintiff. He was canvassing for business for the defendant; had made several trips to plaintiff's house, before he saw him, to insure it, and, against plaintiff's preference, finally induced him to insure in this company. He was supplied with its blanks, and was employed and paid by it. This application was practically the work of Beals, though the stipulation on the face thereof provides that the answers and statements were made by plaintiff, or his authority, thus attempting to make the agent of the company the agent of the assured. The ordinary instructions of companies to their agents, and their dealings with them, are too well known for us to shut our eyes to the manner in which their work is carried on. This is but a form of words to attempt to create on paper an agency, which in fact never existed. It is an attempt of the company, not to restrict the powers of its own agent, but an effort to do away with that relation altogether by mere words, and to make him in the same manner the agent of the assured, when in fact such relation never existed. Insurance Co. v. Myers, 55 Miss. 479 [30 Am. Rep. 521]. We do not believe the entire nature and order of this well-established relation can be so completely subverted by this ingenious device of words. The real fact, as it existed, cannot be hidden in this manner; much less can it be destroyed, and something that did not in reality exist be placed in its stead. The substance is superior to the mere drapery of words with which one party wishes to bring into existence and clothe an unreal authority."[39] 39 Kan. at page 401, 18 Pac. at page 294 (7 Am. St. Rep. 557).

[39] See Johnson v. Ætna Ins. Co., 123 Ga. 404, 51 S. E. 339, 107 Am. St. Rep. 92 (1905), and the numerous cases cited in the note in 107 Am. St. Rep. 99, 106, et seq.

Limitations upon Agent's Power to Estop Company.—Many insurance companies include in the application which the insured is required to sign a stipulation, not only that the agent taking the application has no authority to waive any provision of the policy, but also that the insurer shall not be charged with knowledge of oral statements made by the agent to the insured, in connection with filling out the application. As said by the court in Parno v. Insurance Co., 114 Iowa, 132, 86 N. W. 210 (1901), such a stipulation "amounts to no more than a declaration by a party that he will not be liable for the fraud of his agent committed while acting within the scope of his authority, and such a declaration would be futile."

It would seem clear that a person cannot, by denying the settled rule of law that the principal is charged with knowledge acquired by his agent in the course of his employment, contract against the operation of an estoppel. See Howe v. Provident Fund Society, 7 Ind. App. 586, 34 N. E. 830 (1893); Sternaman v. Insurance Co., 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625 (1902); South Atlantic Insurance Co. v. Hurt, 115 Va. 398, 79 S. E. 401 (1913); Modlin v. Insurance Co., 151 N. C. 35, 65 S. E. 605 (1909); Note, 107 Am. St. Rep. 108. But the Supreme Court of the United States firmly persists in the rule, laid down in New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934 (1886), that such a stipulation was binding upon the insured, who could not claim an estoppel by reason of information given to an agent with powers so limited. See Ætna Life Ins. Co. v. Moore, 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed. —— (1913). See, to the

In the case of Sullivan v. Phenix Ins. Co., 34 Kan. 170, 8 Pac. 112, it was held that an insurance company cannot shirk responsibility for any mistake or fraud committed by its agent during the preliminary negotiations on its behalf by stipulating that he is the agent of the assured. Such a stipulation involves a legal contradiction and is invalid.

In the case of Insurance Co. v. Gray, 44 Kan. 731, 25 Pac. 197, the first paragraph of the syllabus reads as follows: "An agent authorized to take applications for insurance should be regarded to be acting within the scope of his authority where he fills up the blank application of insurance; and, if, by his fault or negligence, it contains a misstatement not authorized by the instructions of the party who signed it, the wrong should be imputed to the company, and not to the assured."

In the case of Insurance Co. v. Davis, 59 Kan. 521, 526, 53 Pac. 856, 858, the opinion reads: "There was proof to the effect that the agent of the company who filled out the application for the policy was informed by Davis that he already held an accident policy in the Travelers' Insurance Company, but for some reason that fact was omitted from the application. It is well settled that, where the agent of an insurance company who fills out an application for insurance is duly informed as to facts and fails to state

same effect, Kibbe v. Hamilton Mut. Ins. Co., 11 Gray (Mass.) 163 (1858); Ryan v. World Mut. Life Ins. Co., 41 Conn. 168, 19 Am. Rep. 490 (1874); Dimick v. Metropolitan Life Ins. Co., 69 N. J. Law, 384, 55 Atl. 291 (1903).

Yet strangely enough, in the light of New York Life Ins. Co. v. Fletcher, supra, it was held in Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 10 Sup. Ct. 87, 33 L. Ed. 341 (1889), that because of an Iowa statute applicable to the case, making the agent taking the application the agent of the insurer rather than of the insured, the company was estopped by knowledge communicated to the agent; and this in the face of the following sweeping limitation in the application: "And it is hereby further covenanted and agreed that no statements or representations made or given to the person soliciting this application for a policy of insurance or to any other person shall be binding on the said company, unless such statements or representations be in writing in this application when the said application is received by the officers of the said company at the home office of the said company, in Hartford, Conn."

Mr. Justice Harlan, speaking for the court said: "By force of the statute, he was the agent of the company in soliciting and procuring the application. He could not, by any act of his, shake off the character of agent for the company. Nor could the company by any provision in the application or policy convert him into an agent of the assured. If it could, then the object of the statute would be defeated. In his capacity as agent of the insurance company, he filled up the application,—something that he was not bound to do, but which service, if he chose to render it, was within the scope of his authority as agent. If it be said that, by reason of his signing the application, after it had been prepared, Stevens is to be held as having stipulated that the company should not be bound by his verbal statements and representations to its agent, he did not agree that the writing of the answers to questions contained in the application should be deemed wholly his act, and not, in any sense, the act of the company, by its authorized agent. His act in writing the answer, which is alleged to be untrue, was, under the circumstances, the act of the company. If he had applied in person, at the home

them in the application, the actual knowledge of the agent will be held to be the knowledge of the company."

In the case of Insurance Co. v. Bank, 60 Kan. 630, 637, 57 Pac. 524, 526, the opinion reads: "In the case at bar the agent was bound to write the answers to the questions in the application as dictated by the insured, and the latter was not called upon to assume that a fraud was being practiced upon him, nor can he be charged with negligence in believing that the agent was acting in good faith. Although Rammelsberg might have received from the insurance company the policy with the written application attached thereto, yet he had a right to assume that the answers made by him were correctly written, and cannot be chargeable with negligence for his failure to be suspicious, or for too much confidence in the good faith of the agent in carrying out his directions."

In the case of Insurance Co. v. Darrin, 80 Kan. 578, 103 Pac. 87, it was held that the insured has the right to assume that the policy he receives is prepared in accordance with his application; that it is the duty of the insurer so to prepare it; and that the fact that the insured does not read the policy until after a loss has occurred will not defeat recovery.

The attitude of this court toward the subject under consideration is further disclosed in numerous other decisions of like character.

office, for insurance, stating in response to the question as to other insurance the same facts communicated by him to Boak, and the company, by its principal officer, having authority in the premises, had then written the answer, 'No other,' telling the applicant that such was the proper answer to be made, it could not be doubted that the company would be estopped to say that insurance in co-operative societies was insurance of the kind to which the question referred, and about which it desired information before consummating the contract. The same result must follow where negotiations for insurance are had, under like circumstances, between the assured and one who in fact, and by force of the law of the state where such negotiations take place, is the agent of the company, and not, in any sense, an agent of the applicant."

In general, an insurance company may limit the apparent powers of its agents, as any other principal may, by stipulation properly brought to the knowledge of a third person dealing with it. So the company may not only limit the extent of the agent's activity, but it may also limit the manner in which an act shall be done. For example, the agent may be authorized to waive provisions of the policy only in writing. See Porter v. Home Friendly Soc., 114 Ga. 937, 41 S. E. 45 (1902); Gould v. Dwelling House Ins. Co., 90 Mich. 302, 51 N. W. 455 (1892); Id., 90 Mich. 308, 52 N. W. 754 (1892); Quinlan v. Providence Washington Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645 (1892). A stipulation, however, which seeks to deprive *all* the officers or agents of the corporation of authority to act, cannot be effectual, since a corporation can act only through its agents, and the powers given it by law cannot be taken away by limitations attempted to be imposed by such agents upon their own powers. See the excellent opinion of Dickinson, J., in Lamberton v. Connecticut Fire Ins. Co., 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222 (1888); Westchester Fire Ins. Co. v. Earle, 33 Mich. 143 (1876); Renier v. Dwelling-House Ins. Co., 74 Wis. 89, 42 N. W. 208 (1889). For a collection of the cases, see note, 107 Am. St. Rep. 101.

In this case the agent had authority to negotiate, write, and transmit the application. For those purposes he had all the power the company itself possessed, and agreements made with him as to what the terms of the application should be were made with the company. It was the agent's duty to frame the application according to the agreement with the plaintiff, and his neglect to do so was the neglect of the company. His knowledge of the agreement was the knowledge of his principal, and consequently for all purposes of the law the defendant knew the true terms of the application. With such knowledge it accepted and approved the application, received and retained the first year's premium, and issued the policy. This made a binding contract of insurance, incorrectly evidenced, however, through the defendant's fault. True, on the face of the policy, and under the provision of the application quoted above relating to the force of statements not in writing, the defendant did not appear to be liable. But the defendant cannot take advantage of its own wrong and successfully oppose the right of the plaintiff to have the agreement relating to the date when the annual premium should fall due written into the application, and to have the policy reformed accordingly. On the policy reformed to state truthfully the contract actually made, the defendant is liable.

If the insured, or the plaintiff, had discovered the omission from the application and the error in the policy, it would have been his duty to call them to the attention of the company, and have the necessary corrections made. Delay would have indicated acquiescence, and if sufficiently prolonged might have affected the right to the equitable remedy of reformation. But there is no evidence that the mistakes were discovered until the policy had matured by the death of the insured. Meanwhile the plaintiff and the insured were not negligent in failing to examine the application or the policy, and were justified in supposing that they had been written as contemplated.

There was evidence to the effect that the agent made no agreement fixing June 14th as the date when premiums should fall due, but the district court has resolved the question of fact in favor of the plaintiff upon the evidence quoted above, which this court regards as sufficient.

The judgment of the district court is affirmed. All the Justices concurring.[40]

[40] See McMaster v. New York Life Ins. Co., 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64 (1901), and Stramback v. Fidelity Mut. Ins. Co., 94 Minn. 281, 102 N. W. 731 (1905), in which similar results on analogous states of facts were reached on a very different theory. But it seems that the courts are disposed to give full effect to the antedating of the policy in order to avoid a forfeiture. Thus, when a policy dated May 22d, but actually issued on July 6th, was to be avoided if the insured committed suicide within one year after the "issuance" of the policy, it was held that the period specified ran

SECTION 6.—WHAT CONSTITUTES WAIVER AND ESTOPPEL

GIBSON ELECTRIC CO. v. LIVERPOOL & LONDON & GLOBE INS. CO.

(Court of Appeals of New York, 1899. 159 N. Y. 418, 54 N. E. 23.)

Action by Gibson Electric Company against the Liverpool & London & Globe Insurance Company. From a judgment of the trial court dismissing plaintiff's complaint, plaintiff appealed to the appellate division of the supreme court, where the judgment was affirmed (46 N. Y. Supp. 1092). From the judgment of affirmance, plaintiff appealed. Affirmed.

MARTIN, J. This action was upon a standard policy of fire insurance, whereby the defendant insured the plaintiff's buildings, engines, machinery, goods, and other property described therein for the period of one year from November 23, 1890. Among others, the policy contained provisions to the effect that the company should not be liable beyond the actual cash value of the property insured at the time any loss or damage should occur; that the loss or damage should be ascertained or estimated according to such actual cash value; that such ascertainment or estimate should be made by the insured and the defendant, or, if they differed, by appraisers, as therein provided; and that the entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, should be void if, with the knowledge of the insured, foreclosure proceedings were commenced, or notice was given of the sale of any property covered by the policy by virtue of any mortgage or trust deed. The policy also included the usual provisions requiring all the property remaining after the fire to be exhibited; that the assured should submit to examination under oath, and produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof; and that, when there was a disagreement as to the amount of any loss, it should be ascertained by two competent and disinterested appraisers, each party to select one, the two chosen to select a competent and disinterested umpire, the award of any two to determine the loss, and the parties to pay the appraiser respectively selected by them, and to bear equally the expenses of the appraisal and umpire. It also provided that the company should not be held to have waived any provision or condition of the policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal or to any examination therein provided for.

from May 22d, so that the insurer was liable when the insured committed suicide on June 12th following. Anderson v. Mut. Life Ins. Co., 164 Cal. 712, 130 Pac. 726 (1913).

When the policy was issued, the premises were incumbered by a mortgage held by Job R. Furman, who, upon his refusal to join as plaintiff, was made a defendant in this action. On the 14th of April, 1891, Furman commenced an action to foreclose his mortgage, which was prosecuted to judgment, and upon the 31st day of October the property was advertised for sale. That judgment was, however, subsequently set aside, a trial was had, and a final judgment entered dismissing the complaint in that action. But subsequently, and in July, 1892, a second action was brought, which resulted in a judgment foreclosing the mortgage, and directing a sale of the property. A sale was had on December 3, 1892, and, the sum realized being insufficient to pay the amount due upon the mortgage, a judgment for the deficiency was entered December 28, 1892. Upon the occurrence of the fire, notice was promptly given to the defendant, and soon after an agreement for submission to appraisers of the amount of the plaintiff's loss was executed by the parties, and appraisers were appointed. At that time the defendant had no notice of the action to foreclose the mortgage, and received none until the 4th of November, 1891. It was then notified by the attorneys for the defendant Furman, to whom the defendant wrote on the next day, "The entire matter is now in the hands of our adjuster, who will give the same due attention in accordance with the terms and provisions of the policy." When the company ascertained that an action of foreclosure had been commenced, the adjustment of the loss by the appraisers was still pending, and was not concluded until a month afterwards.

The record discloses that during the time the appraisal was in progress the defendant examined the plaintiff's books, bills, and vouchers, and that the plaintiff's president was required to and did incur some expenses in the conduct of the appraisal, and subsequently paid one of the appraisers $35. It does not, however, clearly appear whether the examination of the plaintiff's books or the acts performed by the plaintiff's president were after or before the time when the defendant learned of the foreclosure action. Upon the 16th of December, when the appraisal was concluded, and the award made, the plaintiff executed and delivered to the defendant proofs of loss, which were retained by it. Upon the next day it acknowledged receipt of the proofs, and seems to have claimed that the policy was void. All we have found in the record to show what the company did when the proofs of loss were received is contained in the evidence of the witness Gibson, who testified to having received a letter from the defendant on December 17th, acknowledging the receipt of the proofs of loss, and making the comment that the policy was void. The record discloses that, while the defendant became aware of the pendency of the foreclosure action on the 4th of November, and the proceedings before the appraisers were not concluded until the 4th of the following December, yet it made no objections to the award or to the continuance of the appraisal,

nor did it in any way claim to the plaintiff that it was not liable upon the policy until after the 16th of that month, when the proofs of loss were served.

The trial court dismissed the complaint upon the ground that the policy was void by reason of the commencement of the action to foreclose the mortgage upon the premises. The appellate division affirmed the judgment of the trial court upon the same ground, and also held that the omission of the insurance company to disaffirm the adjustment after knowledge of the forfeiture of the policy did not constitute a waiver of such forfeiture. This is based upon the provision in the policy that the company should not be held to have waived any condition or forfeiture by any requirement, act, or proceeding on its part relating to the appraisal or to the examination provided for, and also upon the ground that the appraisal agreement contained a provision that such appointment and submission were without reference to any other questions or matters of difference within the terms and conditions of insurance, and were of binding effect only so far as the actual cash value of the loss and damage to the property was concerned. It also decided that the facts relied upon to show a waiver by the defendant, which consisted of trouble and expense connected with the appraisal, the furnishing of proofs of loss, the examination of the plaintiff's books and papers, and paying the appraisers, were all connected with the appraisal, and were covered by the provision of the policy relating to that subject.

The appellant, however, to sustain its appeal, takes the broad ground that, when the defendant permitted the adjustment to proceed after knowledge of the forfeiture, it waived the forfeiture, and the policy was fully reinstated. This contention rests upon the proposition that the acts of the company were in affirmation of the policy, and it could not affirm the policy and at the same time deny its validity; in other words, it could not recognize the policy as an existing contract for the purposes of appraisal, for the examination of books and papers and the examination of parties, and still repudiate it upon the ground that it was forfeited by reason of the action to foreclose the mortgage. It claims that when the company acquired knowledge of the foreclosure, and hence the condition of the policy was broken, and it deliberately recognized its existence for the purpose of appraisal, it constituted a reaffirmance of the contract, and it continued.

The case of Titus v. Insurance Co., 81 N. Y. 410, is relied upon by the plaintiff, and claimed to be decisive of this question. In that case it was asserted that the policy was void by reason of the foreclosure of a mortgage upon the property insured. The defendant, after it had notice of the proceeding, required the insured to appear, and be examined, and the court held that the insurance company had the right to make the examination only under the policy, and by exercising that right it recognized its validity, subjected the insured to trouble and expense, and thus waived the forfeiture occasioned by the fore-

closure. The policy in that case provided that the use of general terms, or language less than a distinct, specific agreement, clearly expressed and indorsed on the policy, should not be construed as a waiver of any printed or written condition or restriction therein. It is said that that provision is as broad and comprehensive as the condition in the standard policy, and hence that that case is an authority sustaining the plaintiff's contention.

The question as to what constitutes a waiver of a forfeiture under the provisions of a fire insurance policy has often been considered by this court. Thus, in Weed v. Insurance Co., 116 N. Y. 106, 22 N. E. 229, it was decided that, to establish a waiver of a forfeiture in a policy of insurance, the proof must show a distinct recognition of the validity of the policy after a knowledge of the forfeiture by the person by whom it is claimed such forfeiture was waived. In Roby v. Insurance Co., 120 N. Y. 510, 518, 24 N. E. 810, it was declared that where, after knowledge of the forfeiture of a policy, the insurer recognizes its continued validity, does acts based thereon, and requires the insured, by virtue thereof, to do some act or incur some trouble or expense, the forfeiture is, as a matter of law, waived, and the waiver need not be based upon any new agreement, or upon estoppel. In that case it was said that: "The policy in question was void or valid as a whole. If any part was valid, it was all valid. The defendant could not enforce any part without practically admitting that it was operative in all its parts." Pratt v. Insurance Co., 130 N. Y. 206, 29 N. E. 117, is to the effect that where the agents or committee of an insurance company, after being apprised of facts affecting the policy, asked the insured to fill out the blank proofs of loss which they gave him, called for his books, required him to furnish information, which they knew involved trouble and loss of time for him to obtain, it was a ratification of the policy, and a waiver of the forfeiture. It was decided in Armstrong v. Insurance Co., 130 N. Y. 560, 29 N. E. 991 that, while a waiver of a condition of forfeiture contained in a policy of insurance need not be based upon a technical estoppel, yet, in the absence of an express waiver, some of the elements of an estoppel must exist, and that the insured must have been misled by some action of the company, or it must have done something, after knowledge of a breach of the condition, which could only be done by virtue of the policy, or have required something from the assured which he was bound to do only at the request of the company under a valid policy, or have exercised a right which it had only by virtue of such policy. In that case it was held, as it was in the Titus Case, that a waiver could not be inferred from mere silence, but would require some affirmative action on the part of the insurer which indicated that it intended to waive the result of the plaintiff's breach. Bishop v. Insurance Co., 130 N. Y. 488, 29 N. E. 844, is to the effect that a company issuing a policy containing a provision that it shall not be modified or changed except in writing signed by it may, by its conduct, estop itself

from enforcing the provision against a party who has acted in reliance upon such conduct. Again, in Ronald v. Association, 132 N. Y. 378, 30 N. E. 739, it was, in effect, said that, in the absence of any agreement, a waiver of forfeiture of a policy results only from negotiations or transactions with the insured, by which the insurer, after knowledge of the forfeiture, recognizes the continued existence of the policy, or does acts based thereon, or requires the insured, by virtue thereof, to do some act, or incur some expense or trouble. Quinlan v. Insurance Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645, is, in many respects, similar to the case at bar. In that case the policy contained the same provisions as the policy in suit relating to proceedings to foreclose a mortgage, and also as to the power of an agent to waive any of the conditions or provisions of the policy, and it was held that the provisions in a policy to the effect that no representative of the company should have power to waive any condition or provision except by writing indorsed upon the policy were valid, and that the condition that such waiver was to be written upon the policy was of the essence of the authority of the agent to act, and that a consent or act not so indorsed was void; citing Walsh v. Insurance Co., 73 N. Y. 10; Marvin v. Insurance Co., 85 N. Y. 278, 39 Am. Rep. 657. Of that case it may be said, however, that it was held that the agent had no authority whatever to bind the company, in writing or otherwise, or to waive any condition of the policy. In Kiernan v. Insurance Co., 150 N. Y. 190, 44 N. E. 698, it was held that, when an appraisal of the loss under a fire insurance policy is proper in any event, the fact that one was had at the request of the company has no bearing upon the question of forfeiture. The question of waiver was also considered in Van Tassel v. Insurance Co., 151 N. Y. 130, 45 N. E. 365, where it was, in effect, held that, in the absence of a subsequent waiver, the rights of the insured are to be determined as of the date of the fire, and that to establish a waiver a preponderance of evidence is requisite. In Walker v. Insurance Co., 156 N. Y. 628, 51 N. E. 392, where an insurer, after having made a contract of fire insurance, in ignorance of the existence of a chattel mortgage which rendered the insurance voidable, learned of the existence of the mortgage, and thereafter treated the policy as valid, and put the insured to trouble or expense on account thereof, it was held that those acts were evidence from which the jury might find a waiver of a forfeiture. This court has several times held that the provisions in a standard policy, restricting the power of an agent to waive any of its conditions except in a particular manner, cannot be deemed to apply to the conditions which relate to the inception of the contract, where the agent delivered it and received the premium with a knowledge of the true situation. Wood v. Insurance Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733.

Although the decisions of this court of which we have made this brief review seem to warrant the conclusion that an insurer, even un-

der the provisions of a standard policy, may estop itself from claiming, or may waive, a forfeiture under its conditions by its acts and the requirements it makes of the insured after knowledge of the forfeiture, still the circumstances and acts which are required to constitute such an estoppel or waiver seem to be quite firmly established. Thus, in the absence of an express waiver, at least some of the elements of an estoppel must exist. The insured must have been misled by some act of the insurer, or it must, after knowledge of the breach, have done something which could only be done by virtue of the policy, or have required something of the assured which he was bound to do only under a valid policy, or have exercised a right which it had only by virtue of such policy. Such an estoppel or waiver must be established by the person claiming it by a preponderance of evidence, and neither an estoppel nor a waiver of the breach of a condition after forfeiture, by reason thereof, can be inferred from mere silence or inaction.

Applying these principles to the case under consideration, it becomes manifest that the plaintiff's appeal cannot prevail. The most that the plaintiff has established by the proof is that for a month or more after the defendant became aware of the fact that the policy was forfeited by the commencement of the foreclosure action, and until the proofs of loss were furnished, the defendant simply remained silent and inactive. Upon receiving the proofs, however, the defendant immediately notified the plaintiff that its policy had been forfeited, and was void, and since that time it has performed no act inconsistent with that claim. The plaintiff has in no way been misled by any act or statement of the defendant. It has done nothing under the policy, has exercised no right by virtue of it, nor has it required the plaintiff to perform any act which it was required by the policy to perform. The most that can be said as to the continuance of the appraisal is that the defendant did nothing, and whatever was done by the plaintiff was voluntary.

Under these circumstances we have no doubt as to the correctness of the decisions below, and hence the judgment should be affirmed, with costs. All concur. Judgment affirmed.[41]

[41] As indicated in the principal case, there is much confusion in the case law as to whether a waiver, express or implied, requires the support of a consideration; manifestly such consideration may be by way of benefit to the one waiving, or of detriment to the other party—that is, estoppel. As said by Marshall, J., in Pabst Brewing Co. v. Milwaukee, 126 Wis. 110, 116, 105 N. W. 563 (1905): "The efforts of courts and text-writers to harmonize the situations to which the principle of waiver has been applied with the idea that some element of estoppel or some consideration is necessary to support the defense has led to many interesting discussions and the assignment of reasons much too shadowy to be appreciated by minds generally, if at all. It must be conceded that in many cases where the defense of waiver has prevailed no element of estoppel can be pointed to. If it were otherwise, many instances of supposed waiver would be misnamed, the proper designation of the defense being estoppel. It may be that the theory advanced by a learned writer is correct, that in every case where the law of waiver is ap-

plicable, and there is no element of estoppel, there is one of consideration, in the broad sense of the term as applicable to contracts. A consideration essential to a contract is satisfied by a disadvantage to the promisee as well as by a benefit to him. 1 Parsons on Contracts (9th Ed.) § 467. So waiver may perhaps be viewed as involving a consideration and supported on that theory. In every case where the waivee asserts as a defense submission by the waiver, the former would be prejudiced if the latter were allowed to successfully change his position. 58 Cent. Law J., 264. It would seem that the more satisfactory ground to support the doctrine of waiver on is that it is a rule of judicial policy—the legal outgrowth of judicial abhorrence, so to speak, of a person's taking inconsistent positions and gaining advantages thereby through the aid of courts."

Undoubtedly there is much authority in support of the following statement found in the opinion of Sharpe, J., in Alabama State Mutual Assurance Co. v. Long Clothing & Shoe Co., 123 Ala. 667, 675, 26 South. 655 (1899): "A waiver may be founded upon an estoppel, but it is not so necessarily. Though the conduct of the insurer may not have actually misled the insured to his prejudice, or into an altered position, yet if, after knowledge of all the facts, its conduct has been such as to reasonably imply a purpose not to insist upon a forfeiture, the law leaning against forfeitures will apply the peculiar doctrine of waiver invented probably to prevent them, and will hold the insurer irrevocably bound as by an election to treat the contract as if no cause of forfeiture had occurred."

Some of the cases go so far as to impose upon the insurer, who has knowledge of an existing cause of forfeiture, the duty of affirmative action indicating an intention to enforce the forfeiture, such as notice to the insured that the insurance is no longer in force, or the cancellation of the policy. Thus mere inaction on the part of an insurer knowing of a breach of condition constitutes a waiver of the forfeiture. Thus in Kelly v. People's Nat. Fire Ins. Co., 262 Ill. 158, 104 N. E. 188 (1914), the agent of the insurer was notified that foreclosure proceedings had been begun against the insured, which fact, by the terms of the policy, avoided the insurance. The agent did nothing. It was held that by such indiscreet inaction the insurer had waived the forfeiture. The court said: "Where there is a stipulation that a policy shall become void upon the happening of some subsequent event, and the insurer has notice that the event has occurred, but does not cancel the policy, the provision is waived and the policy remains in force. That rule was applied in North British & Mercantile Ins. Co. v. Steiger, 124 Ill. 81, 16 N. E. 95 (1888), where the policy provided that it should become void if certain subsequent conditions therein mentioned should exist, and it was held that, if the insurance company, with knowledge on the part of its agent of the existence of such a condition, did not cancel the policy, it did not become void. There was an instruction which stated that rule, based on the hypothesis that the insurance agent had notice of the foreclosure suit and that there was a failure to cancel the policy, and the instruction was correct."

See, in accord, Kelly v. People's Nat. Fire Ins. Co., 262 Ill. 158, 104 N. E. 188 (1914); British-America Assurance Co. v. Bradford, 60 Kan. 82, 55 Pac. 335 (1898); 12 Harv. Law Rev. 508, and note. The weight of authority is, however, opposed to such a view and in accord with the principal case. See Home Fire Ins. Co. v. Wilson (Ark.) 159 S. W. 1113 (1913); Coppoletti v. Citizens' Ins. Co., 123 Minn. 325, 143 N. W. 787 (1913). See note in 16 Harv. Law. Rev. 217.

MUDGE v. SUPREME COURT, I. O. F.

(Supreme Court of Michigan, 1907. 149 Mich. 467, 112 N. W. 1130, 14 L. R. A. [N. S.] 279, 119 Am. St. Rep. 686.)

Action by Elizabeth Mudge against the Supreme Court, Independent Order of Foresters. Judgment for defendant, and plaintiff brings error. Affirmed.

HOOKER, J. The plaintiff in this cause is a widow and beneficiary in a fraternal benefit certificate. Her action is brought to recover the amount thereof, and is predicated upon the death of her husband. The defense is reduced to one claim, viz., that the deceased made an intentionally false answer in his medical examination to the question, "Have you ever had the disease of insanity?" Upon the trial the learned circuit judge was of the opinion that the undisputed testimony established this defense, and he therefore directed a verdict for the defendant, and afterwards denied a motion for new trial. The plaintiff has appealed.

The undisputed testimony shows that the insured had previously been insane, and confined in the asylum as insane, for three months, upon an adjudication by the probate court that he was insane, based upon an application, sworn to and filed by this plaintiff, stating that he was insane. It also shows that he had delusions, and that he had attempted suicide twice. It appeared with equal conclusiveness that he knew that he had been confined and treated as insane, and there was no testimony that he stated these facts to the agent or examining physicians, and was not a party to the insertion of the false answer in the application or report of the examining physician. On the contrary, it was shown that his answers were faithfully recorded. There is no occasion to allude to the attempted discrimination between "insanity" and the disease of insanity under the facts in this case. Hence we find that upon the record the judge was warranted in saying that the proof established the insured's insanity and his knowledge of and fraudulent concealment of the same. There can be no question that this was sufficient to deprive his beneficiary of the right to recover, unless the company was estopped to assert the claim by reason of the alleged knowledge of its agents or by a waiver.

It is contended that there was evidence tending to show that both the agent who took the application and the physician who made the examination knew at that time that the insured had been insane, and that his answers were false, and that this was the knowledge of the defendant, and is sufficient to estop it from denying the truth of the answer. Were this a case where the insured had made no misrepresentation in his answer, and was excusably ignorant of fraudulent conduct on the part of the company's agent in inserting an answer different from that given, there might be reason for this claim.

In this case the most that plaintiff's counsel could possibly contend

is that by collusion between the applicant and defendant's agent they made a false answer, and now seek to hold the company by making a "sword instead of a shield" out of the salutary rule that the knowledge of the agent is notice to the principal. Good faith is always essential to an estoppel. In Insurance Co. v. Gilbert, 27 Mich. 429, where the insured answered truly, but the agent inserted a false statement, with his knowledge, stating that it was right, and the insured signed, honestly believing that it was right, this court in reversing the judgment said: "The very form and obvious purpose of the application, with the consideration contained in it, showed that the statements it contained were to be understood as made by the applicant and upon his responsibility, as the basis of the contract of insurance he expected to obtain. Although a person ignorant of the meaning of special provisions used in such papers or in the policy, or of the sense attached to them by the insurers, or of the particular rules or manner of doing business, has a right to rely on the instructions and assurances of the agent of such insurers, and upon his acts in reference to such matters, in filling out the application, yet he cannot, therefore, escape the responsibility for the statement of facts which he inserts himself in the application, or permits the agent to insert as his, upon which he is just as well informed as the agent himself."

In the case of Insurance Co. v. Reed, 84 Mich. 532, 47 N. W. 1108, 13 L. R. A. 349, the court said that, "if the insured had no information of the agent's misrepresentation, the company could not take advantage of the wrong of its agents and avoid the policy, but that it would have been otherwise, had the insured conspired with the agent, or had the insured, being fully informed of the representation made and the contents of the application, neglected to bring it to the attention of the company." In the recent case of Ketcham v. Accident Association, 117 Mich. 521, 76 N. W. 5, Mr. Justice Moore said, with the approval of the full bench, that "it is urged that, as the agent knew the answers were not true, his knowledge was the knowledge of the company, and, having issued the policy, the company was bound. The courts have always been anxious to take care of the rights of the insured, when the applicant has relied upon the agent's informing the company of what had been truthfully told to him about the character of the risk; but the courts never have said the company is bound by statements contained in an application when not only the agent, but the insured, knows they are untrue and calculated to deceive, and the application is to be forwarded to the company as the basis of its action. To so hold would put these organizations completely at the mercy of dishonest and unscrupulous agents."

In the case of Maier v. Association, 47 U. S. App. 329, 24 C. C. A. 243, 78 Fed. 570, Mr. Justice Harlan used the following vigorous language: "It was said on the argument that the company should not be permitted to take advantage of the misconduct or wrong of its own

agent; but the law did not prohibit the company from taking such precautions as were reasonable and necessary to protect itself from the frauds and negligence of its agents. If the printed application used by it had not informed the applicant that he was to be responsible for the truth of his answers to questions, and if the want of truth in such answers was wholly due to negligence, ignorance, or fraud of the soliciting agent, a different question would be presented; but here the assured was distinctly notified by the application that he was to be held as warranting the truth of his statements, 'by whomsoever written.' Such was the contract between the parties, and there is no reason in law or public policy why its terms should not be respected and enforced in an action on the written contract. It is the impression with some that the courts may in their discretion relieve parties from the obligations of their contract, whenever it can be seen that they have acted heedlessly or carelessly in making them; but it is too often forgotten that, in giving relief under such circumstances to one party, the courts make and enforce a contract which the other party did not make or intend to make. As the assured stipulated that his statements, which were the foundation of the application, were true, by whomsoever such statements were written, and as the contract of insurance was consummated on that basis, the court cannot, in an action upon the contract disregard the express agreement between the parties and hold the company liable if the statements of the assured, at least touching matters material to the risk, are found to be untrue." In Insurance Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, Mr. Justice Field said: "A curious result is the outcome of the instruction. If the agents committed no fraud, the plaintiff cannot recover, for the answers reported are not true; but, if they did commit the imputed fraud, he may recover, although upon the answers given, if truly reported, no policy would have been issued. Such anomalous conclusions cannot be maintained."

There are many decisions elsewhere which refuse to apply the rule of estoppel in cases of this kind. 3 Cooley's Briefs in Ins. Cases, 2569; Welsh v. London Ins. Corp., 151 Pa. 607, 25 Atl. 142, 31 Am. St. Rep. 786; Insurance Co. v. Fromm, 100 Pa. 347; Insurance Co. v. Smith, 92 Fed. 503, 34 C. C. A. 506; Clemans v. Sup. Assemb., 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33; Boyle v. N. M. Ben., 95 Wis. 318, 70 N. W. 351; Prov. Soc. v. Llewellyn, 58 Fed. 940, 7 C. C. A. 581.

The case of Perry v. Mut. Life Co., 143 Mich. 295, 106 N. W. 860, and 147 Mich. 645, 111 N. W. 195, is said to establish for this state a different rule and to have overruled the three cases quoted from. Upon its first hearing that case might have turned either on the question of waiver or of the substantial truth of the answer; it appearing that there was evidence that defendant's agent knew the insured's character when he wrote the policy, and the company's superintendent

afterwards collected premiums with knowledge of her occupation. We held there that unless the warranty that she was a housewife was substantially true, or its truth waived, the policy was void, and that these were questions for the jury. It is a legitimate conclusion that, although she maintained a bawdyhouse, which the court said was incontestably proved, it did not necessarily follow that her statement that she was a housewife and had not been in any other occupation for two years was not substantially true. One of the definitions of housewife, viz., "a female manager of domestic affairs," was quoted in the opinion. Upon a second trial the claim that defendant's superintendent collected premiums was eliminated upon this question. The learned circuit judge instructed the jury that "it does not seem to me that it is a conclusive question, because I think if the money was paid—if the agent at the time he took this application knew of her character, and they gave her occupation as housewife, instead of prostitute, that I still think the company would be liable, and in this case I do not think the question is a conclusive question." This was sustained.

It cannot be denied that this gives plausibility to the claim that defendants make, viz., that, although both insured and agent knew of her disreputable character and the omission to state it, the knowledge of the agent estopped the defendant. It should be considered, however, in the light of the previous opinion, viz., that her answer might be found substantially true; i. e., that she was a housewife, and that she had not engaged in other occupations within two years. This part of the charge related to the question of waiver, which the court held was not the only question in the case. If he had used the word "might," instead of "would," the decision would not have the significance contended for, and it is quite probable that this language may have been qualified by other portions of the charge relating to the other question in the case. Counsel pertinently suggest that no allusion was made to the cases quoted from. They could not well have been overlooked, and would not have been ignored, had there been an intention to overrule them.

Counsel have raised the further point that the defense should have been held to have failed for another reason. The by-laws formed a part of the contract, and were not offered in evidence by the defendant. The policy and the physician's examination were sufficient to show the breach of contract, and, if plaintiff's counsel had claimed that the by-laws would have shown the contrary, they would doubtless have produced them. To reverse the judgment upon this ground would be to do so for a very technical reason, or upon a presumption that the by-laws nullified the express provisions of the policy.

The plaintiff has failed to show any error, and the judgment is affirmed.[42]

[42] The doctrine of estoppel as applied to insurance contracts being equitable in its nature, it would seem manifest that actual knowledge of the in-

sured of the false statements inserted in the policy by the agent, or collusion between the insured and the agent to defraud the insurer, would defeat the insured's claim to an estoppel as against the insurer. See New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934 (1886); Blooming Grove Mut. Fire Ins. Co. v. McAnerney, 102 Pa. 335, 48 Am. Rep. 209 (1883); Centennial Mut. Life Ins. Ass'n v. Parkam, 80 Tex. 518, 16 S. W. 316 (1891); Forwood v. Prudential Ins. Co., 117 Md. 254, 83 Atl. 169 (1912); Haapa v. Metropolitan Life Ins. Co., 150 Mich. 467, 114 N. W. 380, 16 L. R. A. (N. S.) 1165 (1907); note in 14 L. R. A. (N. S.) 279. But in Sun Life Ins. Co. v. Phillips (Tex. Civ. App.) 70 S. W. 603 (1902), and in Ætna Life Ins. Co. v. Bockting, 39 Ind. App. 586, 79 N. E. 524 (1906), it was held that if the agent had knowledge of the falsity of the statements the fact that the insured knew of the existence of such false statements would not defeat recovery.

The reason for this view is well expressed in Reserve Loan Life Ins. Co. v. Boreing, 157 Ky. 730, 163 S. W. 1085, 1087 (1914). The company claimed a forfeiture of the policy because of the false statements made by the insured as to his indulgence in alcoholic drink. The court said: "Here the company might have relied on the truthfulness of the answers contained in application. It did not do so. It sought information from another source. That information brought home to it knowledge of the very facts on which it is now sought to defeat the policy. Instead of rejecting the application, it issued the policy and accepted the premium. Under these circumstances, it is estopped to rely on the falsity of the answers contained in the application. Masonic Life Insurance Co. v. Robinson, 149 Ky. 80, 147 S. W. 882, 41 L. R. A. (N. S.) 505 (1912)."

For a collection of the authorities, see Vance Ins., p. 370, note 64, and p. 326, note 103; 14 L. R. A. (N. S.) 279, note; 16 L. R. A. (N. S.) 1249, note.

CHAPTER IX

RIGHTS UNDER THE CONTRACT

SECTION 1.—FIRE INSURANCE

I. Bailor and Bailee

SYMMERS v. CARROLL.

(Court of Appeals of New York, 1913. 207 N. Y. 632, 101 N. E. 698, 47 L. R. A. [N. S.] 196.)

Cuddeback, J. This action was brought by the plaintiff, in his own behalf and in behalf of all others similarly situated. Prior to December 16, 1904, John H. Starin, the defendants' testator, was the owner of a steamboat used by him in carrying merchandise and passengers from the city of New York, in this state, to the city of New Haven, in the state of Connecticut. On the day mentioned the boat left New York, bound for New Haven, with a cargo of general merchandise, which included merchandise owned and shipped by the plaintiff's assignors, with the freight charges paid or agreed to be paid thereon. While the steamboat was on Long Island Sound in the course of the voyage, it was burned to the water's edge, and the cargo was totally destroyed. By a decree of the United States District Court, made under the federal statutes, it has been adjudged that Starin was not liable for the loss or damage growing out of the destruction by fire of the merchandise on the vessel.

Before the voyage on which the fire occurred, Starin had procured from the Home Insurance Company a policy of insurance on the cargo which reads in part as follows: "The Home Insurance Company, New York, by this policy of insurance * * * does insure John H. Starin as freighter, forwarder, bailee, common carrier or for account of whom it may concern, loss if any payable to him or order, to the amount of $20,000, on goods, wares and merchandise," against loss by fire while on board the vessel so destroyed.

After the fire Starin collected the amount of the insurance, $20,000, but refused to pay over to the plaintiff's assignors any part thereof, though he had paid a portion of the moneys received to the owners of other parts of the cargo lost. The complaint also alleges that the plaintiff has no knowledge as to the exact value of the merchandise destroyed by the fire, nor as to the identity of the owners, but that such owners are very numerous, and the action is brought for their benefit,

as well as for the benefit of the plaintiff. The demand for relief is that the defendants account for the insurance moneys collected by Starin, and pay over to the plaintiff and the other persons entitled to share therein their proportionate parts thereof.

To the complaint setting forth these facts the defendants demurred, upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled by the court at Special Term, and an interlocutory judgment to that effect was entered, with leave to the defendants to amend on the usual terms. The Appellate Division affirmed the interlocutory judgment, and in affirming the same certified that a question of law had arisen in the case which in its opinion ought to be reviewed by the Court of Appeals. The question accordingly certified is: "Does the complaint state facts sufficient to constitute a cause of action?"

The argument of the defendants is that Starin had the right as common carrier to insure the cargo for his own benefit, and that he had the right to collect and retain the amount of the loss, irrespective of the question whether he was liable to the owners of the cargo for the damages which they had sustained. The plaintiff cites Phœnix Ins. Co. v. Erie & Western Transportation Co., 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873; Baxter v. Hartford Fire Ins. Co. (C. C.) 12 Fed. 481, and Munich Assurance Co. v. Dodwell, 128 Fed. 410, 63 C. C. A. 152.

These were all cases wherein the common carrier had been relieved by the shipper from liability for loss occasioned by fire. It was held that, although relieved from such responsibility, the carrier remained liable for his negligence, and therefore his right to collect the insurance moneys was not to be determined, after the loss, by inquiry whether he was in fact liable to the owners of the cargo. He could insure himself against his own negligence, and against the necessity of entering into any inquiry as to his negligence. Here the shippers did not release the carrier from liability for loss by fire, and the cases cited do not apply.

It is also the law that a common carrier can, if he so desires, insure the goods left in his charge, not only for his own benefit but for the benefit of the owners as well. Waring v. Indemnity Fire Ins. Co., 45 N. Y. 606, 6 Am. Rep. 146; Hagan v. Scottish Ins. Co., 186 U. S. 423, 22 Sup. Ct. 862, 46 L. Ed. 1229; Pennefeather v. Baltimore Steam Packet Co. (C. C.) 58 Fed. 481; Home Ins. Co. v. Minneapolis, St. Paul, etc., R. R. Co., 71 Minn. 296, 74 N. W. 140.

In Waring v. Indemnity Fire Ins. Co., supra, the policy of insurance covered oil owned by the plaintiff, "or held in trust on commssion, or sold, but not removed, contained in bonded warehouse." It was held after loss that the plaintiff could recover for himself and for the benefit of a vendee for oil sold, but not removed from the warehouse. Judge Folger said: "It is laid down in broad terms that one may, in his own name, insure the property of another for the benefit of the

owner without his previous authority or sanction, and that it will inure to the benefit of the owner upon a subsequent adoption of it, even after a loss has occurred." 45 N. Y. 611, 6 Am. Rep. 146.

In Hagan v. Scottish Ins. Co., supra, the defendant insured the plaintiff Hagan "on account of whom it may concern," against loss by fire on a tug, her hull, etc. The plaintiff subsequently sold a one-half interest in the tug to Martin. After a loss it was held that the plaintiff could recover on the policy. The court said: "The words 'on account of whom it may concern' do not refer to those interested in the policy simply at the time it was taken out. The terms refer to the future. It is not a question of the persons concerned when it is taken out, but of those who may be concerned when the loss may occur, and who were within the contemplation of him who took out the insurance at the time he did so. It is on account of those who in the future, at the time of the happening of a loss, have the insurable interest and in regard to whom the policy will be applied. We think this the common-sense interpretation of the language used, and that it is justified and required by the authorities. * * *" 186 U. S. 433, 22 Sup. Ct. 866, 46 L. Ed. 1229.

When the carrier receives the proceeds of the policy of insurance for account of whom it may concern, he holds the money as trustee for those concerned.

No particular words are necessary to create a trust. Trust relations will be implied, when it appears that such was the intention of the parties, and when the nature of the transaction is such as to justify or require it. Hoffman House v. Foote, 172 N. Y. 348, 65 N. E. 169.

A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust, within the meaning of the provision of the Code of Civil Procedure (section 449). It was so held in Duncan v. China Mutual Ins. Co., 129 N. Y. 237, 29 N. E. 76, which was an action on a policy of insurance issued by the defendant to the plaintiff on account of whom it may concern.

Starin in this case, having been relieved by the decree of the federal courts from all liability to the owners of the cargo for their loss by fire, could not collect the amount of the loss on their property beyond the extent of his charges, except as trustee. It is held in Home Ins. Co. v. Minneapolis, St. Paul, etc., R. R. Co., supra, that though a carrier has no pecuniary interest in the goods in his possession, and is not liable for their loss by fire, he may insure them as "his own or held in trust by him," and in case of loss may recover in his own name, holding all in excess of his own claim in trust for the shipper.

If Starin held the insurance moneys as trustee, then the owners of the cargo here represented by the plaintiff had the right to call him to account, and it was his duty to state his account and prove the items of his loss. Kliger v. Rosenfeld, 120 App. Div. 396, 105 N. Y. Supp. 214. It was his further duty, after paying himself, to divide what re-

mained of the insurance money among the owners of the cargo according to their respective rights and interest.

It is held in Pennefeather v. Baltimore Steam Packet Co., supra, that where a carrier secures insurance on goods belonging to numerous owners for their benefit as well as his own, and, the goods being destroyed, collects the entire amount of the insurance, equity has jurisdiction, on the ground of avoiding a multiplicity of suits and the difficulty of making a proper apportionment, of a suit by some of the owners for the benefit of all who might join to recover their proportional interests therein.

Within the doctrine of the cases cited it was not necessary to allege in the complaint, as the defendant contends, that there was any previous contract or arrangement between the carrier and the shippers that he should procure insurance on their account, or that they should pay any part of the insurance premium. It is sufficient if he intended to insure their interests in the cargo for their benefit, and such intention is established by the words in the policy "for account of whom it may concern." Furthermore, it was not necessary to allege that the carrier's loss did not absorb the whole amount of the insurance moneys, as the fact, whatever it may be, would be brought out on an accounting.

It does not appear from the complaint that any of the shippers had taken out insurance for their own benefit, or that the policy issued to the carrier contained any provisions that would be applicable if there was other insurance on the cargo. If there was other insurance obtained by any individual shipper, that might affect the amount of his recovery. These matters would also be a proper subject of inquiry on the accounting, with all other facts touching the rights of any of the parties to share in the insurance moneys.

The question certified should be answered in the affirmative, and the order appealed from affirmed, with costs.[1]

Cullen, C. J., and Gray, Werner, Collin, and Miller, JJ., concur. Hiscock, J., absent.

Order affirmed.

[1] As to the rights of bailor and bailee in insurance taken out by the latter, see 11 Harvard Law Rev. 512, 520; 4 Cooley, Briefs on Insurance, 3692.

II. Assignor and Assignee

SADLERS' CO. v. BADCOCK.

(High Court of Chancery, 1743. 2 Atk. 554, 20 Eng. Reprint, 733.)

See ante, p. 40, for a report of the case.[2]

DAVIS v. BREMER COUNTY FARMERS' MUT. FIRE INS. ASS'N.

(Supreme Court of Iowa, 1912. 154 Iowa, 326, 134 N. W. 860.)

Action to recover for a loss by fire, alleged to be covered by a policy of insurance in the defendant company. The court sustained a demurrer to the petition, and on the election of plaintiff to stand on his pleading, judgment was rendered for the defendant, from which the plaintiff appeals. Affirmed.

McClain, C. J. On May 22, 1908, the defendant company executed to Mrs. William Blume its policy of insurance against loss or damage by fire to her dwelling house and farm buildings in the sum of $800. On or about the 26th day of October, in the same year, Mrs. Blume sold and conveyed the real estate on which such buildings were situated to this plaintiff, said conveyance being by warranty deed, and at the same time, and as part of the consideration of the purchase of the property by plaintiff, "it was understood and agreed that he should succeed to and become the owner of said policy of insurance and all the rights, interest, and privileges thereunder, and that plaintiff is now the owner and holder thereof." The by-laws of the defendant company, which are by reference made a part of the contract of insurance, contain the following article:

"Sec. 18.—The holders of unexpired policies are liable for all assessments. Any member desiring his policy cancelled must return it with the request to cancel to the secretary of the associa-

[2] Assignment of Marine Policies.—It has long been settled that in accordance with the custom of merchants, contracts of marine insurance are assignable without the consent of the insurer. Wakefield v. Martin, 3 Mass. 558 (1799); Swan v. Maritime Ins. Co., [1907] 1 K. B. 116. The common-law doctrine was affirmed in England in the Marine Insurance Act (6 Edw. VII, c. 41) §§ 50, 51. See Arnould on Marine Insurance, § 174.

But in the leading case of Powles v. Innes, 11 M. & W. 10 (1843), it was held that the mere transfer of the ship insured did not carry with it the policy of insurance upon the vessel. There must have been an assignment, or an agreement to assign at the time of the transfer of the property. To the same effect is North of England Co. v. Archangel Maritime Ins. Co., L. R. 10 Q. B. 249 (1875).

tion, who will be governed by article XII of the articles of incorporation. Any member disposing of property insured must have his policy either cancelled or transferred; if a transfer is desired, both seller and purchaser should appear at the office of secretary or assistant secretary, that the transfer be properly made upon register and policy."

The only written or formal assignment from Mrs. Blume to plaintiff was the printed form of assignment on the back of the policy, filled out to read as follows: "Transfer.—Sumner, Iowa. Trans. Nov. 13–08. Burnt Nov. 9–08. For the consideration of the payment of present dues I hereby transfer the within policy to W. E. Davis. [Signed] Mrs. Wm. Blume. In the presence of J. A. Lease, Assistant Secretary."

It does not appear that, prior to this formal assignment, the policy had been delivered to plaintiff; but it does appear "that, on account of the absence of the assistant secretary, the formal transfer of the policy was not indorsed thereon until on or about the 13th day of November, 1908, at which time said policy was presented to the said assistant secretary," and that information was then given him of the purchase of the property by plaintiff and the assignment of the policy to him, and that "thereupon the said assistant secretary duly indorsed and consented to the transfer thereof, thereby ratifying and confirming the assignment and transfer of said policy of insurance to said plaintiff." On November 9, 1908, there was a complete destruction of the buildings by fire, and on the next day the plaintiff sent to the defendant company certain alleged proofs of loss, in which he described himself as owner and holder of the policy by assignment and delivery to him by Mrs. Blume on October 26, 1908.

The foregoing are the material facts as alleged in the petition, which must be treated as true in passing upon the demurrer, which sufficiently raises the questions whether the absolute sale and conveyance of the property by Mrs. Blume to the plaintiff, prior to the fire, by terminating her insurable interest, terminated, also, her right to recover under the policy, and whether, by the alleged agreement of assignment at the time of the conveyance, and by the formal assignment after loss, plaintiff acquired any right to recover under the policy. The sufficiency of the proofs of loss is also put in issue by the demurrer.

1. If any one proposition can be regarded as having been definitely settled by early adjudications, and as having remained definitely settled, notwithstanding constant modifications of the law on the subject of fire insurance by changes of view on the part of courts and of policy on the part of Legislatures, it is the proposition, made up of three distinct elements working together to one result, that the purchaser of the absolute title and right to

property covered by a fire insurance policy is not entitled to the indemnity provided for in the policy on account of a damage to or destruction of the property subsequent to the transfer, unless, by the consent of the insurer, the policy has been assigned to the purchaser by the former owner. The three elementary principles of fire insurance which, working together, bring about this inevitable result are, first, that a policy of fire insurance is a contract of indemnity, and if, at the time of loss, the holder of the policy has no right, title, or interest to or in the property insured he cannot recover anything under his contract of insurance, for the damage to or destruction of the property results in no injury to him; second, that the purchaser of the property, taking it prior to the loss, is not a party to any contract of insurance between the former owner and the insurer, and therefore is not entitled to recover under such contract; and, third, that the contract of fire insurance, being personal in its nature, cannot be transferred by the insured to another, save in accordance with provisions of the contract itself, involving the express or implied assent of the insurer, or a valid contract of the insurer that it shall become liable to the new owner. These elementary propositions are not dependent on any stipulations, conditions, or limitations of the contract itself, but result from the very nature of the contract, though, of course, they may be superseded or waived by provisions in the contract, or by a new valid contract or agreement subsequently made.

In support of the general proposition involved, it is sufficient to cite a few authorities, with the suggestion that, so far as they sustain these elementary principles, they have remained unquestioned in any cases to which our attention has been called, or of which we have any knowledge: Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; Lane v. Maine Mut. F. Ins. Co., 12 Me. 44, 28 Am. Dec. 150; Morrison's Adm'r v. Tennessee M. & F. Ins. Co., 18 Mo. 262, 59 Am. Dec. 299; Mutual Protection Ins. Co. v. Hamilton, 5 Sneed (Tenn.) 269; Ayres v. Hartford F. Ins. Co., 17 Iowa, 176, 85 Am. Dec. 553; Simeral v. Dubuque Mut. F. Ins. Co., 18 Iowa, 319; White v. Robbins, 21 Minn. 370; New England Loan & Trust Co. v. Kenneally, 38 Neb. 895, 57 N. W. 759; Insurance Co. of N. America v. Martin, 151 Ind. 209, 222, 51 N. E. 361; Lett v. Guardian F. Ins. Co., 125 N. Y. 82, 25 N. E. 1088; 1 May, Insurance (4th Ed.) § 264, 19 Cyc. 583, 591, 633; 13 Am. & Eng. Enc. (2d Ed.) 100, 184. Unless, therefore, something may be found in the provisions of the contract authorizing the substitution of plaintiff for Mrs. Blume, or some consent to such substitution on the part of the defendant is made to appear, then plaintiff cannot recover.

2. Plaintiff relies, first, on an agreement between him and his grantor, Mrs. Blume, the insured, entered into as a part considera-

tion of the purchase of the property, that plaintiff should succeed to and become the owner of the policy of insurance and of all the rights, interest, and privileges of the insured thereto. Conceding that this is a sufficient allegation of a present assignment, it is manifestly insufficient to show that plaintiff thereby acquired any contractual rights against this defendant, as insurer; for, as already stated, the contract of fire insurance is a personal contract, not assignable before loss without the consent of the insurer. The statutory provisions (Code, §§ 3044, 3046), declaring that all instruments by which the maker promises to pay another, without words of negotiability, a sum of money, are assignable by indorsement thereon, or by other writing, even though by the terms of the instrument its assignment is prohibited, have been applied to sustain a right of action by the assignee of a fire policy who takes an assignment thereof after loss, notwithstanding provisions in the policy against assignment. Walters v. Washington Ins. Co., 1 Iowa, 404, 63 Am. Dec. 451; Mershon v. National Ins. Co., 34 Iowa, 87. Such a conclusion is in accordance with the reason and policy of the statute; for, after the loss has occurred, the obligation of the insurer under the policy is to pay a sum of money, the right to which may properly be transferred, although the amount may not yet be definitely ascertained. After the loss, no personal element remains in the contract, and the relations of the parties to it are simply those of debtor and creditor. But we have never held that these statutory provisions render assignable a personal executory contract. On the contrary, we have plainly intimated that such a contract is not assignable without consent of the other party to the contract. Rappleye v. Racine Seeder Co., 79 Iowa, 220, 44 N. W. 363, 7 L. R. A. 139; Peterson v. Ball, 121 Iowa, 544, 97 N. W. 79.

We find nothing in our statutes or decisions inconsistent with the continued recognition of the general rule of law that personal contracts, executory in their nature and involving relations of trust and confidence, are not assignable by one party thereto without the consent of the other. A laborer or other employé, whether skilled or unskilled in the particular line of employment, cannot substitute another employé for himself, under a contract involving the rendition of services, so as to obligate his employer to accept the services of such other person and pay for them under the terms of the contract. Cases already cited amply support the proposition that the relations of insured and insurer involve an element of personal confidence in the insured on the part of the insurer, and for that reason are unassignable, save with the consent of the latter.

The written assignment above set out does not purport to be anything more than an assignment by Mrs. Blume, executed after the loss, of the rights which she then had under the policy. This

assignment passed nothing to the plaintiff; for after the loss Mrs. Blume had no right to recover anything, because she had no insurable interest covered by the policy. The assent of the assistant secretary to such an assignment could not create in Mrs. Blume, for the purpose of transfer to plaintiff, any right which she did not have; and there is nothing in the assignment, to which the assistant secretary assented, to justify the assumption that such officer was waiving, on the part of the company, its right to insist that the prior verbal agreement between Mrs. Blume and the plaintiff was not effectual to impose any liability on the company which it had not assumed by the issuance of its policy.

The invalidity of the policy after the attempted transfer thereof by Mrs. Blume to the plaintiff in connection with the conveyance of the property was not the result of any forfeiture on account of condition subsequent. The contract of insurance came to an end because the subject-matter of the contract—that is, the insurable interest of Mrs. Blume—had ceased to exist. The assent of the company to a new obligation on its part toward this plaintiff was a condition precedent, without compliance with which no new contract could arise. What is said in the case of Woodmen Acc. Ass'n v. Pratt, 62 Neb. 673, 87 N. W. 546, 55 L. R. A. 291, 89 Am. St. Rep. 777, in relation to forfeitures not being favored, has therefore no application, and plainly the case is not in point, as it does not involve a contract of fire insurance which in its nature differs, in respect to assignability, from a contract of accident insurance. The difficulty alleged in plaintiff's petition of securing the assent of the assistant secretary to an assignment of the policy would not in itself give rise to any right on the part of this plaintiff to become the assured under the policy, in the absence of the assent on the part of the company, which was required by its by-laws to be given before any new obligation on its part could arise; and it is not claimed that there is any provision in the by-laws authorizing an assistant secretary to create new obligations of insurance otherwise than by giving his assent to an assignment of an existing policy, made in his presence. For these reasons, the cases of German Ins. Co. v. Rounds, 35 Neb. 752, 53 N. W. 660, and Beebe v. Ohio Farmers' Ins. Co., 93 Mich. 514, 53 N. W. 818, 18 L. R. A. 481, 32 Am. St. Rep. 519, relied on for appellant, are not in point.[3] * * *

Judgment affirmed.[4]

[3] The remainder of the opinion, deciding that the general rule applicable to assignments of fire policies was equally operative in the case of a mutual insurance association like the defendant, is omitted.

[4] The case dealing with the assignment of policies of insurance on property may be found collected in 2 Cooley, Briefs on Insurance, 1063–1078.

After the loss has occurred, since the liability of the insurer then becomes fixed, the policy may be assigned as any chose in action, without the consent of the insurer. See Bartling v. German Mut. Lightning & Tornado Ins.

ILLINOIS MUT. FIRE INS. CO. v. FIX.

(Supreme Court of Illinois, 1870. 53 Ill. 151, 5 Am. Rep. 38.)

Mr. Justice LAWRENCE. The appellee, Fix, being indebted to Mayer, for whose use this suit is brought, executed to him his notes, secured by mortgage on a brewery, and at the same time assigned to him a policy of insurance, issued by the appellants, upon the building and fixtures. This assignment was made with the consent of the company indorsed upon the policy. The present suit was brought in the name of Fix for the use of Mayer, and resulted in a verdict and judgment for the plaintiff, from which the company appealed.

On the trial, the company offered to prove that the building was set on fire by the plaintiff, Fix. The evidence was objected to by plaintiff's counsel, and the objection was sustained. This ruling presents the main question in the case, to wit, whether, where a policy of insurance has been assigned by the assured to one holding a mortgage on the premises, with the consent of the company indorsed upon the policy, its validity can be destroyed by acts done by the assignor in violation of its conditions.

This question has received much discussion in the Courts of New York, and the decisions first made have been deliberately overruled. It was first held, in the Traders' Ins. Co. v. Robert, 9 Wend. (N. Y.) 404, that no act of the assured, after the assignment of the policy with the consent of the company, can impair the rights of his assignee. This case was approved and followed in Tillon v. Kingston Mutual Ins. Co., 5 N. Y. 406, the Court holding that the assignment of a policy, with the assent of the insurer, creates new and mutual relations and rights between the assignee and the insurer, which cannot be impaired by a third person, over whom the assignee has no control.

The question again came up in Grosvenor v. Atlantic Fire Ins. Co., 17 N. Y. 392, and in the Buffalo Steam Engine Works v. Sun Mutual Ins. Co., Id. 401. In the first case, the policy was not assigned by the mortgagor to the mortgagee, but by its original terms, the loss, in case of fire, was made payable to the mortgagee. The majority of the Court held the case was not distinguishable from an assignment of the policy, and overruling the cases already cited, held the policy was avoided by certain acts done by the mortgagor in violation of its terms. One of the eight Judges composing the Court, dissented altogether, and two others concurred only on the ground that the case was not like one in which the policy had been assigned. In the other case, de-

Co., 154 Iowa 335, 134 N. W. 864 (1912); Imperial Fire Ins. Co. v. Dunham, 117 Pa. 460, 12 Atl. 668, 2 Am. St. Rep. 686 (1888). Since a transfer of a policy of insurance as collateral security is not an assignment, it necessarily follows that a pledge of the policy does not require the consent of insurer, even though there is a stipulation requiring such consent to an "assignment." See Insurance Co. of Pennsylvania v. Phœnix Insurance Co., 71 Pa. 31 (1872); Phillips v. Merrimack Mut. Fire Ins. Co., 10 Cush. (Mass.) 350 (1852); Ellis v. Kreutzinger, 27 Mo. 311, 72 Am. Dec. 270 (1858).

cided at the same term, and which was one of assignment, the majority of the Court held the policy avoided by the acts of the assignor, the three Judges dissenting.

In these two cases, the question involved received a much fuller discussion than was given to it when the former decisions were rendered. In reply to the argument of the Court in 9 Wend. 404, that the assignor could not be permitted to execute a release to the insurance company which would impair the rights of the assignee, and that he should not be permitted to do indirectly what he could not do directly, the Court very justly say, this argument fails to distinguish between acts done for the purpose of discharging a liability, and acts which, by the terms of the contract, were necessary to be done or omitted, in order to continue the liability in force. The principle, however, laid down in the case in 5 N. Y. 406, that the assignment of a policy, with the assent of the company, creates new relations and rights between the assignee and the company, is not wholly repudiated as never applicable, for it is admitted that, in cases where there has been an absolute sale of the insured property, the assured retaining no interest in it, and there has been an assignment of the policy to the purchaser, with the consent of the company, such purchaser may be considered as becoming a party to the contract, taking upon himself the performance of its conditions, while the assignor, ceasing to be a substantial party, and having no interest in the subject-matter, could do no act affecting the rights of the assignee.

The Court insists, however, that this principle cannot be applied to an assignment to a mortgagee, because, in such cases, the mortgagor retains his interest in the property and in the policy, and whenever the mortgage debt is paid, the benefit of the policy reverts to him, or in case the policy exceeds the amount of the mortgage, the surplus, in the event of a loss, would be payable to the mortgagor. The Court further say, that the rule of the former cases would make insurance companies liable for risks which they never assumed, and against which their policies are intended to guard them, for under this rule, a mortgagor remaining in possession, might convert a building insured as a dwelling-house, to a use vastly more hazardous, as by making it a place for manufacturing fire-works, and still the company be required to pay, although one of the material terms of its contract was that its liability should cease in the event of such a change in the uses of the property.

The Supreme Court of Pennsylvania, in State Mutual Ins. Co. v. Roberts, 31 Pa. 438, adopts the rule of these cases, in a well considered opinion. The Supreme Court of the United States in Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 10 L. Ed. 1044, lays down a similar principle. This rule is also followed in Pupke v. Resolute Ins. Co., 17 Wis. 378, 84 Am. Dec. 754. On the other hand, the earlier New York cases were followed in Pollard v. Somerset Mutual Fire Ins. Co., 42 Me. 226.

In this State the question is an open one. Counsel for appellee cite the N. E. Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 242, and City Fire Ins. Co. v. Marks, 45 Ill. 482, as adopting the rule of the earlier New York cases. But in the first of these cases, the policy was issued directly to the mortgagees, and assigned by them with the note and mortgage, and the question in regard to which the case in 5 N. Y. was cited, was as to the right of the assignee to bring suit in the name of the assignors. In the case in 45 Ill. the assured had sold the stock of goods insured, and the policy had been assigned to the purchaser with the consent of the company. The Court in its opinion, cites the earlier New York cases only, but even under the rule laid down in the last case, in 17 N. Y., the assignee was entitled to recover, the transaction being a sale and not a mortgage.

This Court has shown in various cases, a disposition to hold insurance companies to a full measure of responsibility, but we are of opinion that the cases in 17 N. Y. stand upon the better reason.

The consent of insurance companies to an assignment of the policy by a mortgagor to a mortgagee, should not be construed as imposing upon them, as a consequence of such mere naked assent, a liability which they never would intentionally assume, and against which they take all possible pains to guard themselves, and must guard themselves in order to preserve their solvency. The principle contended for by counsel for appellee, and laid down in the earlier New York cases is, that no act of the assignor, done without the consent of the assignee, can invalidate the policy, so far as relates to the assignee. If this be true without limitation, then, as said by the New York Court of Appeals, a risk taken by a company at the lowest rates, because in the least hazardous class, might be changed by the mortgagor remaining in possession, and without the concurrence of the mortgagee, to the class of extrahazardous, and the liability of the company would remain the same. A detached dwelling-house might be converted into a powder magazine, or to some other use which would prevent any sound insurance company from taking the risk on any terms, and still under the rule claimed by appellee, the company would remain responsible. The mortgagor might go further, and not only convert his building to extra-hazardous uses, but absolutely set it on fire, with a view of defrauding the company, as the appellants offered to prove was done in the present case.

We cannot adopt a rule which would lead to such results. In analogy to the case of absolute sales by the assured, we should be much inclined to hold to the rule announced in 1 Selden, if it were possible to separate the interest of the mortgagor and mortgagee. But it is not, for the mortgagor is not only interested in the payment of the mortgage, but where he pays the premium, the fruits of the policy absolutely belong to him, subject to the lien of the mortgagee. Where there is an absolute sale, there is no difficulty in determining the measure of the assignee's rights and the company's liabilities, for he stands in

the position of receiving a new policy as owner, and becomes responsible for any extra-hazardous uses to which the building may be applied, a responsibility he cannot evade on the ground that the building is not under his control. But where there is no sale, but the policy is merely assigned as security, we are obliged to hold, either that the company is bound absolutely to the assignee, no matter how far the conditions of its contract may have been violated, which would be a very unreasonable ruling, or that there is such identity of interest in regard to both the property and the policy, that there can be no recovery, even for the use of the assignee, if the assignor fails to comply with the conditions.

The utmost that can be claimed for an assignee in such cases is that he should stand in the same position as if he had taken out a new and independent policy to protect his own interest as mortgagee. But admitting such claim, we have no rule to guide us. It is impossible for us to say what conditions the company would deem it necessary to insert in such a policy for its own protection. It is very certain it would stipulate that the hazard to the building should not be increased, and thus would compel the mortgagee to take upon himself the responsibility of the mortgagor's acts, from which he could not escape by saying that his rights should not be prejudiced by the acts of a third person. It would necessarily result, from the nature of the interest insured, that its owner might be damnified by the acts of the mortgagor in possession, although beyond his control. Whether a company would also stipulate, in such a policy, that neither the mortgagor nor the mortgagee should obtain further insurance without its consent we do not know, though it is evident such a stipulation would be a wise precaution.

The history of the Robert Case in 9 Wend. singularly illustrates the injustice of attempting to base a judgment against an insurance company in favor of the mortgagor, upon the equities of his assignee. In that case, the judgment was rendered in favor of Robert, the mortgagor, for the use of Bolton, his assignee, on the ground that, though Robert had violated the policy, this could not prejudice Bolton. After the rendition of the judgment, and before its payment, Robert paid off the mortgage, and threatened the insurance company with an execution. The company moved the Court for a perpetual stay, which was granted, the Court holding consistently with its former ruling, that Robert had no equitable rights under the policy: 9 Wend. 404 and 474. From this order an appeal was taken to the Court for the correction of errors, and that Court held, as the original judgment was unreversed, it was conclusive upon the rights of the parties, and as the mortgage had been paid, the benefit of the judgment reverted to Robert, the mortgagor. He thus received the full benefit of the policy, although he had forfeited all rights under it, and a judgment had been rendered in his favor only in consequence of the equities of his assignee: 17 Wend. 631.

It is, in our opinion, very clear, if we attempt to dispose of cases of this character on the theory that the assignment is to be treated as a new policy, issued directly to the mortgagee, for his exclusive benefit, and to adjust the rights of these parties in accordance with what we may suppose such a policy would contain, we shall be wandering in a labyrinth where there would be but one thing certain, and that is, that great injustice would be done these companies. We should practically be enforcing liabilities against them which they never intended to incur, and giving to the mortgagor the benefit of a policy in which he has forfeited all his rights.

We deem it safer and more just to say, that where a policy is assigned as collateral to a mortgage, though with the consent of the company, the assignee takes it subject to the conditions expressed upon its face, or necessarily inhering in it, and that no recovery can be had merely in consequence of the equities of the assignee, if the assignor has lost the right to recover by violating the terms of the contract.

The evidence, offered to show that the plaintiff set the building on fire, should have been admitted, and the instruction asked for defendants, in regard to the effect of a second insurance, should have been given.

Judgment reversed.[5]

III. Vendor and Vendee

RAYNER v. PRESTON.

(Court of Appeal, 1881. L. R. 18 Ch. Div. 1.)

This was an appeal by the plaintiffs from a decision of Jesse, M. R., 14 Ch. D. 297. The plaintiffs purchased from the defendants a messuage and workshops. Between the date of the contract and the time fixed for completion, the buildings purchased were injured by fire. The vendors had before the contract insured the buildings against fire, but there was not in the contract any mention of this fact or of the policy. The plaintiffs brought an action to establish their right to a sum received by the vendors from the insurance office, or to have it applied in or towards reinstating the buildings injured.

Brett, L. J.[6] For a reason which will presently appear, viz., the different opinion of Lord Justice James, I give with some fear the result of the, I must say, very clear opinion which I have in this case.

[5] Compare Hall v. Insurance Co., 93 Mich. 184, 53 N. W. 727, 18 L. R. A. 135, 32 Am. St. Rep. 497 (1892); Ellis v. Insurance Co., 64 Iowa, 507, 20 N. W. 782 (1884); Ellis v. Insurance Co. (C. C.) 32 Fed. 646 (1887); Continental Ins. Co. v. Munns, 120 Ind. 30, 22 N. E. 78, 5 L. R. A. 430 (1889).

[6] Part of the opinion is omitted.

This action is brought by the plaintiffs against the defendants to recover money which is in the hands of the defendants; and, therefore, if the action had been brought at common law, it would have been an action for money had and received. That action was always treated at common law as being founded upon equity, and therefore it seems to me that the decision in this case, whatever it ought to be, would be the same whether it should be considered to be a decision at common law or in equity.

It seems to me that the question raised between the plaintiffs and the defendants calls upon us to consider, first of all, the nature of a policy of fire insurance; and, secondly, what was the relation with regard to the policy and to the property between the plaintiffs and the defendants in this case. Now, in my judgment, the subject-matter of the contract of insurance is money, and money only. The subject-matter of insurance is a different thing from the subject-matter of the contract of insurance. The subject-matter of insurance may be a house or other premises in a fire policy, or may be a ship or goods in a marine policy. These are the subject-matter of insurance, but the subject-matter of the contract is money, and money only. The only result of the policy, if an accident which is within the insurance happens, is a payment of money. It is true that under certain circumstances in a fire policy there may be an option to spend the money in rebuilding the premises, but that does not alter the fact that the only liability of the insurance company is to pay money. The contract, therefore, is a contract with regard to the payment of money, and it is a contract made between two persons, and two persons only, as a contract.

In this case there was a contract of insurance made between the defendants and the insurance company. That contract was made by the defendants, not on behalf of any undisclosed principal, not on behalf of any one interested other than themselves. The contract was made by the defendants solely and entirely on their own behalf, and at a time when they had no relation of any kind with the plaintiffs. It was a personal contract between the defendants and the insurance office, to which they were the sole parties. It is true that under certain circumstances a policy of insurance may, in equity, be assigned, so as to give another person a right to sue upon it; but in this case the policy of insurance, as a contract, never was assigned by the defendants to the plaintiffs. It would have been assigned by the defendants to the plaintiffs if it had been included in the contract of purchase, but it was not. Any valuation of the policy, any consideration of increase of the price of the premises in consequence of there being a policy, was wholly omitted. There was nothing given by the plaintiffs to the defendants for the contract. The contract, therefore, neither expressly nor impliedly, was assigned to the plaintiffs; and, so far as regards the contract of insurance, there never was any relation of any kind between the plaintiffs and the defendants.

But there did exist a relation between the plaintiffs and the defendants, not with regard to the subject-matter of the contract, but with regard to the subject-matter of the insurance. There was a contract of purchase and sale between the plaintiffs and the defendants in respect of the premises insured. It becomes necessary to consider accurately, as it seems to me, and to state in accurate terms, what is the relation between the two people who have contracted together with regard to premises in a contract of sale and purchase. With the greatest deference, it seems wrong to say that the one is a trustee for the other. The contract is one which a court of equity will enforce by means of a decree for specific performance. But if the vendor were a trustee of the property for the vendee, it would seem to me to follow that all the product, all the value of the property received by the vendor from the time of the making of the contract ought, under all circumstances, to belong to the vendee. What is the relation between them, and what is the result of the contract? Whether there shall ever be a conveyance depends on two conditions; first of all, whether the title is made out, and, secondly, whether the money is ready; and unless those two things coincide at the time when the contract ought to be completed, then the contract never will be completed and the property never will be conveyed.

But suppose at the time when the contract should be completed, the title should be made out and the money is ready, then the conveyance takes place. Now it has been suggested that when that takes place, or when a court of equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back the vendor has been trustee for the vendee from the time of the making of the contract. But, again, with deference, it appears to me that if that were so, then the vendor would in all cases be trustee for the vendee of all the rents which have accrued due and which have been received by the vendor between the time of the making of the contract and the time of completion; but it seems to me that that is not the law. Therefore, I venture to say that I doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other. They are only parties to a contract of sale and purchase of which a court of equity will under certain circumstances decree a specific performance. But even if the vendor was a trustee for the vendee, it does not seem to me at all to follow that anything under the contract of insurance would pass. As I have said, the contract of insurance is a mere personal contract for the payment of money. It is not a contract which runs with the land. If it were, there ought to be a decree that upon the completion of the purchase the policy be handed over. But that is not the law. The contract of insurance does not run with the land; it is a mere personal contract, and unless it is assigned no suit or action can be maintained upon it except between the original parties to it. * * *

I therefore, with deference, think that the plaintiffs here cannot recover from the defendant, on the ground that there was no relation of any kind or sort between the plaintiff and the defendant with regard to the policy, and therefore none with regard to any money received under the policy.[7]

JAMES, L. J. I am unable to concur in affirming the judgment of the Master of the Rolls. According to my view of the case the plaintiff's contention is founded not only on what I may call the natural equity which commends itself to the general sense of the lay world not instructed in legal principles, but also on artificial equity as it is understood and administered in our system of jurisprudence.

I am of opinion that the relation between the parties was truly and strictly that of trustee and cestui que trust. I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is in fieri the relation of trustee and cestui que trust. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is in fieri. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and cestui que trust. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate. Wherever that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is a complete and perfect trust, the legal owner is and has been a trustee, and the beneficial owner is and has been a cestui que trust.

This being the relation between the parties, I hold it to be an universal rule of equity that any right which is vested in a trustee—any benefit which accrues to a trustee, from whatever source or under whatever circumstances, by reason of his legal ownership of the property—that right and that benefit he takes as trustee for the beneficial owner. If the policy of insurance in this case were a collateral

[7] In accord with the opinion of Brett, L. J., in the principal case, see White v. Gilman, 138 Cal. 375, 71 Pac. 436 (1903), (insurance placed by vendor, on building erected by vendee under an executory contract of sale on the property in question, held to inure exclusively to the benefit of vendor, and not subject to be credited on the purchase price). So when, under an executory sale of real estate, the vendor made an absolute assignment of a policy on the buildings to the vendee, the vendor is not entitled to an equitable lien upon the proceeds of the policy paid to the vendee upon the burning of the buildings, even though the vendee is insolvent and the vendor still retains legal title. Zenor v. Hayes, 228 Ill. 626, 81 N. E. 1144, 13 L. R. A. (N. S.) 909 (1907). See, also, in accord, Phœnix Assurance Co. v. Spooner, 74 L. J. K. B. 792 (1905).

contract, such as the policy which a creditor effects on the life of his debtor, the case would be wholly different. But the policy of fire insurance is not, in my opinion, a collateral contract, it is not a wagering contract, a contract that if a fire happens then a certain sum of money shall be paid to the insurer; it is in terms and in effect a contract that, if the property is injured then the insurance company will make good the actual damage sustained by the property. That damage, and that damage only, gives the right and is the measure of the right, and it seems to me impossible to say that it is not by reason of the legal ownership and in respect solely of the injury done to that legal ownership that the right to recover from the insurance company accrued to the insured.

If the fire in this case had happened through the wrongful or negligent act of a third person while the contract was in fieri the legal right to sue for the damage would be in the vendor, but on the completion of the contract the purchaser would be entitled to use of the name of the vendor as his trustee to sue for the damage so sustained, or, if the damages had actually been recovered in the interval, to recover the damages from the vendor. And it appears to me that there is no distinction in principle between this right and the right to use the vendor's name in an action on the contract of indemnity against loss by fire which the policy of insurance is. It is not, in my view of the case, at all material to consider what would be the case if after actual conveyance and during the currency of the policy a fire had occurred. The vendor in that case would have no right as between him and the insurance office, and the purchaser would have no right of action, because one of the conditions of the policy excludes it, and, independently of that condition, the policy would, or might probably be held not to run with the land in the hands of the subsequent owner, and in that case there would not be that which is the foundation of the right—legal ownership and right in one person, and equitable ownership in another.

No doubt it is a mere accident that there was such a policy and there was such a right. The vendor could not have complained if there had been no insurance. But that has occurred in a great variety of cases in which equitable rights have arisen. Where there is a creditor, a debtor, and a surety, and the surety finds out that by something to which he was not privy and of which he had never heard, somebody else had become surety, or the creditor had obtained security, the surety has a right to obtain contribution from such surety, or to obtain such security as the case may be, and the creditor releasing such surety or parting with such security would probably find himself in considerable peril.

In the same city in which this controversy has arisen there occurred some years ago a great destruction of property by reason of an explosion of gunpowder caused by a fire. Houses were damaged, not by fire but by the explosion caused by a fire in another neighboring place. The

insurance offices thought that it was for their interest to be very liberal and treat the damage from the explosion as a damage by fire within the policies, and to pay accordingly. This was a mere act of liberality. They thought it was for their permanent benefit commercially to be liberal, and they were liberal accordingly. See Taunton v. Royal Insurance Company, 2 H. & M. 135. I cannot myself doubt that if a trustee, or a vendor who had become trustee by the completion of his contract, had received this bounty he would have received it by reason of his trusteeship, and would have had to give it up to his cestui que trust or purchaser.

In my view of the case it is perhaps unnecessary to refer to the Act of Parliament as to fire insurance. But that Act seems to me to shew that a policy of insurance on a house was considered by the Legislature, as I believe it to be considered by the universal consensus of mankind, to be a policy for the benefit of all persons interested in the property, and it appears to me that a purchaser having an equitable interest under a contract of sale is a person having an interest in the house within the meaning of the Act. I believe that there is no case to be found in which the liability of the insurance office has been limited to the value of the interest of the insured in the house destroyed. If a tenant for life having insured his house has the house destroyed or damaged by fire, I have never heard it suggested that the insurance office could cut down his claim by shewing that he was of extreme old age or suffering from a mortal disease. In the case of Collingridge v. Royal Exchange Assurance Corporation, 3 Q. B. D. 173, the vendor recovered the whole amount of the loss, although it was absolutely certain, having regard to the solvency of his purchaser, that he would really never suffer any loss at all, personally or otherwise, as trustee for such purchaser.

Of authority on the subject, there is, no doubt, the express decision of Vice Chancellor Kindersley against the plaintiff, but against that there are to be set off the very distinct opinions of Lord St. Leonards and Vice Chancellor Parker, men of great knowledge of equity and of great accuracy even in their dicta.

But I prefer to rest my judgment on the fact that the relation between the vendor and the purchaser became, and was in law, as from the date of the contract and up to the completion of it, the relation of trustee and cestui que trust, and that the trustee received the insurance money by reason of and as the actual amount of the damage done to the trust property. The plaintiff puts his case also on the ground of the representations made to him by the defendant's solicitor and agent. What took place appears to me to be this. The solicitor said to the purchaser, I don't know who is entitled, but the vendor is the only person who has a legal claim, and I will make the claim accordingly whichever is entitled, and the purchaser left the matter in his hands. Now the purchaser could at that time have applied to the office to compel the money to be laid out in restoring the building. And I am of opin-

ion that when the money was under these circumstances obtained from the office, it reached the vendor's hands according to the then rights of the parties as between them and the insurance office, that is to say, as money which ought to be laid out in reinstating the premises, or, in other words, as money which the purchaser alone had any real or substantial interest in.[8]

BRETT, L. J. I should like to add to what I have said that I feel very great doubt whether as between the defendants and the insurance company the defendants can keep the money.

COTTON, L. J. I quite concur in that doubt.

[8] The view of James, L. J., finds considerable support from the American authorities. In Millville Aerie No. 1836, F. O. of Eagles, v. Weatherby (N. J. Ch.) 88 Atl. 847 (1913), a portion of the opinion of Leaming, V. C., is as follows: "As purchaser under a valid contract of purchase vendee became the equitable owner of the property; in equity the property is regarded as belonging to him, the vendor retaining the legal title simply as trustee and as security for the unpaid purchase money. By reason of this equitable relation of the parties to a contract of sale of land, it has been determined by the great weight of American authority that money accruing on a policy of insurance, where the loss has occurred subsequent to the execution of the contract, will in equity inure to the benefit of the vendee; the vendor still retaining his character as trustee, and the insurance money in his hands representing the property that has been destroyed. See 1 Warville on Vendors, p. 205, § 20; 39 Cyc. 1641, 1644. In the event of loss by fire, the proceeds of the insurance policy here in question would have been applied to the payment of the mortgage, the amount of which forms a part of the purchase price of the premises purchased, and any surplus would have further enured to the benefit of the vendee by being applied on his purchase money, and any further surplus would have been payable to him by his vendor. The insurance here in question must therefore be regarded as essentially for the benefit of the vendee, although it afforded an incidental benefit to the vendor in supplying him an additional security for the purchase price of the land; such additional security to vendor cannot, however, be here treated as an element of substantial value to vendor, for the value could only arise from a failure of the vendee to comply with his contractual obligations to the vendor."

To the same effect is Reed v. Lukens, 44 Pa. 200, 84 Am. Dec. 425 (1863); Mattingly v. Springfield Fire & Marine Ins. Co., 120 Ky. 768, 83 S. W. 577 (1904); Skinner & Sons Shipbuilding & Dry Dock Co. v. Houghton, 92 Md. 68, 48 Atl. 85, 84 Am. St. Rep. 485 (1900). In Gilbert v. Port, 28 Ohio St. 276 (1876), the court, admitting that, in so far as the insurer was concerned, only the party contracting with it could claim the benefit of the policy, held, nevertheless, that as between the vendor and vendee the one upon whom the loss by destruction of the property fell, who in this case was the vendor, was entitled to the insurance money. See, in approval of this theory, Brakhage v. Tracy, 13 S. D. 343, 83 N. W. 363 (1900), vendee paid premiums; Phinizy v. Guernsey, 111 Ga. 346, 36 S. E. 796, 50 L. R. A. 680, 78 Am. St. Rep. 207 (1900), vendor suffering loss retains insurance money.

In Williams v. Lilley, 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150 (1895), the court held that under the peculiar facts of the case (the lessee under lease with option of purchase paying premiums on the insurance, taxes, and overhead expenses), the lessor vendor, the party named in the policy as the insured, was in equity required to credit the lessee, on his exercising his option of purchase, with the insurance money that he had received because of damage to the building by fire. See notes, 37 L. R. A. 150–153, and 13 L. R. A. (N. S.) 909.

PEOPLE'S ST. RY. CO. v. SPENCER.

(Supreme Court of Pennsylvania, 1893. 156 Pa. 85, 27 Atl. 113, 36 Am. St. Rep. 22.)

On November 18, 1889, the plaintiff, the Street Railway Company, in consideration of the payment of $20,000 by the defendant, conveyed to the defendant a lot in the city of Scranton on which were located their car barns and offices. Contemporaneously with the delivery of the deed the plaintiff took back a lease of the premises at a nominal rental, with an exclusive option of purchase for $20,000, at the end of the year. Their agreement was continued at the expiration of the first year upon the plaintiff's paying interest on the loan. Under the terms of the lease the plaintiff insured the premises for $12,000 and paid the premiums thereon. The plaintiff was named as the insured in the policy, which contained the following clause: "The interest of the assured in the above described building is the right to purchase from A. D. Spencer, owner; and, in case of loss, the insurance is payable to him, as his interest may appear under said contract." On May 1, 1891, the buildings burned. After the loss the plaintiffs exercised their option of purchase. This proceeding is between the plaintiff and defendant to determine the ownership of the insurance money, the insurer having placed the same in the hands of a third party pending the determination of this action.[9]

MITCHELL, J. All the facts appear in the writings set forth in the plaintiff's statement. None of the papers which are merely referred to, but not set out in full, seem to be essential to the cause of action, and the omission to give them in full is not therefore fatal. The affidavit of defense raises no issue of fact, for it denies no part of the statement, except the inferences from the face of the papers. The case was therefore one for the court to decide upon the statement and affidavit. All the writings constitute parts of one transaction, and the nature of that, beyond question, was a conveyance of the land as security for the repayment of a loan of money. It starts with admitted title in the company (appellee); then a conveyance to appellant for $20,000; a contemporaneous lease from appellant back to the company, at a nominal rent of $1, with no change of possession, which remained all the time in the company; and an absolute and exclusive option in favor of the company to repurchase at the end of the year for the same amount—$20,000—with interest; that is, to resume its original title on payment of the loan. At the end of the term the arrangement was extended, or renewed for another year, during which the option was exercised by the company, the money paid, and the title reconveyed by the appellant. It is unimportant

[9] The statement of facts is abbreviated.

what name we apply to the relation of the parties during the year. Whether technically vendor and vendee, mortgagor and mortgagee, or lessor and lessee, is immaterial. The nature of the relation is incontestable. Appellant was the holder of the legal title, subject to an equity in the company. It is strongly argued for appellant that his interest at the time of the fire was an absolute fee-simple title. But this is an error. It was not absolute. It was the legal title in fee, but subject to the equitable interest of the company—an interest in the land, capable of being specifically enforced, and good, not only against the appellant, but all others, creditors, purchasers, or strangers, to whom the recorded deeds and the company's possession gave notice.

The only substantial question in the case is the date at which the company's equity became complete. The fire took place during the running of the term. The option to redeem was exercised after the fire had occurred. Did the company's interest begin to run only from the exercise of its option, or did it, upon that event, relate back for all purposes to the beginning of the transaction? We are of opinion that both principle and authority sustain the latter view. As already said, the transaction was in substance a loan of money, and appellant's right was to have his money back with interest at a specified time, or, in default of that, to have his title become absolute. The insurance was for his protection, not to increase his profit; to keep up the sufficiency of his security while the loan lasted, or make good the value of his purchase if it became absolute. For that reason it was to be kept up by the appellee. If the latter had exercised its option before the fire, there could have been no question that the insurance money would have belonged to it. But the date of the fire makes no substantial difference when, as was the case, the appellee elected to repay the loan, and resumed its title. On the happening of that contingency, the appellant got his money, with interest, which was all he was entitled to, while the appellee got back its land, lessened in value by the fire, but the loss compensated by the insurance money. The insurance was, in contemplation of law, for the benefit of whomever should be entitled when the option was exercised or expired by default, and, in fact, it was contracted for "as interest may appear." It stood in place of so much of the property as was destroyed by the fire, and followed the title when the equitable and legal interests united.

The authorities, so far as we have any analogous cases, lead to the same conclusion. It was held in Kerr v. Day, 14 Pa. 112, 53 Am. Dec. 526, that an option to purchase is a substantial interest in land, which may be conveyed to a vendee, and the English chancery cases were reviewed by Bell, J., with the result that, "when the lessee made his option to purchase, he was to be con-

sidered as the owner ab initio. Indeed, the determination can only be supported by attributing to the lessee an equitable estate in the land, under his covenant for an optional purchase, which passed to his alienee, vesting him with the right to call for a specific execution on declaring his election." And in Frick's Appeal, 101 Pa. 485, where the land was sold upon a prior judgment before payment or conveyance, it was held that the surplus was the property of the optional vendee. It is true that the option in that case had been exercised before the levy and sale, but that circumstance was not of controlling weight, as the decision was put on the ground that "in equity the vendee became the owner, subject to the payment of the price stipulated. His right of property therein flows from the contract, and exists before any purchase money may have been paid;" citing Siter's Appeal, 26 Pa. 178. We are of opinion that, upon the exercise of its option to redeem, the appellee's equitable title reverted back to the date of the original agreement, and appellee became the owner of the land as it was at such date, or of the insurance money which stood pro tanto in its place.[10]

Judgment affirmed.

IV. Mortgagor and Mortgagee

LEYDEN v. LAWRENCE.

(Court of Chancery of New Jersey, 1911. 79 N. J. Eq. 113, 81 Atl. 121.[11])

Leaming, V. C. At a former hearing touching the sufficiency of a plea which had been filed by complainant to the cross-bill of defendant, I held as follows: "It is settled in this state that a mortgagee of real estate has an insurable interest therein, and when such mortgagee, at his own expense and solely in his own behalf,

[10] Insurance Money Held Substitute for Insured Property.—In Wyman v. Wyman, 26 N. Y. 253 (1863), the owner of real estate secured insurance thereon running to his "executors, administrators or assigns." A loss having occurred shortly after the insured had died intestate, it was held that, while the property insured passed to the intestate's heirs at law, the right of action on the insurance contract passed to his administrator; but it was further decided that the proceeds of the policy, as recovered by the administrator, came to his hands as realty, and therefore were distributable as such among the heirs at law. This case was fully approved in Robl's Estate, 163 Cal. 801, 127 Pac. 55, Ann. Cas. 1914A, 319 (1912), in which it was held that where an executrix took out insurance upon certain personalty specifically bequeathed to her, and it was burned during administration, the proceeds went to her as legatee, rather than to the estate, although the executrix had used money of the estate in paying the premiums. See, also, Haxall v. Shippen, 37 Va. 536, 34 Am. Dec. 745 (1839); Culbertson v. Cox, 29 Minn. 309, 13 N. W. 177, 43 Am. Rep. 204 (1882); Parry v. Ashley, 3 Simons, 97 (1829).

See the excellent article on the principal case in 33 Am. Law Reg. (N. S.) 134.

[11] See same case, 78 N. J. Eq. 453, 79 Atl. 615.

procures insurance on the mortgaged property for the better security of his debt, the insurer, if obliged to pay a loss occasioned by injury to such property, may be subrogated pro tanto to the rights of the mortgagee under the mortgage.[12] Sussex County Mutual Insurance Co. v. Woodruff, 26 N. J. Law, 541; Nelson v. Bound Brook Insurance Co., 43 N. J. Eq. 256 [11 Atl. 681, 3 Am. St. Rep. 308]; Lawrence v. Union Insurance Co. [80 N. J. Law, 133] 76 Atl. 1053. It may be said to be equally well settled that if the insurance has been taken by the mortgagee at the expense and for the benefit of the mortgagor, as well as for his own protection, the mortgagor will have the right, in case of a loss, to have the avails of the policy applied for his benefit toward the discharge of his indebtedness. Pearman v. Gould, 42 N. J. Eq. 4 [5 Atl. 811]." I further held at that time that with the fact established by the mortgagor that the insurance in question had been taken by the mortgagee at the expense and for the benefit of the mortgagor, as well as for his own protection, pursuant to the clause in the mortgage which authorized the mortgagee so to do, the mortgagor would be entitled to have the avails of the policy applied for his benefit toward the discharge of his indebted-

[12] This is unquestionably in accord with the weight of authority. International Trust Co. v. Boardman, 149 Mass. 158, 21 N. E. 239 (1889); Foster v. Van Reed, 70 N. Y. 19, 26 Am. Rep. 544 (1877).

But it is held in Massachusetts that the mortgagee, insuring his distinctive interest solely on his own account may retain insurance money received and also collect his debt. Hence the insurer has no right of subrogation to the mortgagee's claim against the mortgagor. See King v. State Mut. Fire Ins. Co., 7 Cush. (Mass.) 1, 54 Am. Dec. 683 (1851); Suffolk Ins. Co. v. Boyden, 9 Allen (Mass.) 123 (1864), 18 Am. Law Reg. (N. S.) 737.

Insurance by Mortgagor.—In like manner the mortgagee has no rights to the proceeds of insurance taken out by the mortgagor solely to protect his own interest. Shadgett v. Phillips, 131 Ala. 478, 31 South. 20, 56 L. R. A. 461, 90 Am. St. Rep. 95 (1901); Columbian Ins. Co. v. Lawrence, 10 Pet. 507, 9 L. Ed. 512 (1836); Farmers' Loan & Trust Co. v. Penn Plate Glass Co., 186 U. S. 434, 22 Sup. Ct. 842, 46 L. Ed. 1234 (1902).

But the mortgagee has a lien upon the insurance money if the policy was made payable to him as his interest may appear; Wheeler v. Insurance Co., 101 U. S. 439, 25 L. Ed. 1055 (1879).

In Reynolds v. London, etc., Ins. Co., 128 Cal. 16, 60 Pac. 467, 79 Am. St. Rep. 17 (1900), the mortgagor took out insurance payable to the mortgagee as his interest might appear. At foreclosure sale the mortgagee purchased the property and loss occurred during the period of redemption. The former mortgagee was held to have no interest in the insurance money, since after foreclosure he no longer possessed the character of mortgagee.

The mortgagee also has such a lien if the mortgagor has contracted to insure for the mortgagee's benefit.

In Fitts v. Grocery Co., 144 N. C. 463, 57 S. E. 164 (1907), the mortgagor insured for the benefit of a first mortgagee, and subsequently issued a second mortgage covenanting to insure for the benefit of such second mortgagee, but did not do so. The first mortgage having been paid off, the buildings burned. It was held that the second mortgagee was entitled to have his debt paid from the proceeds of the insurance.

For a collection of the cases dealing with the rights of the mortgagor and mortgagee in the proceeds of insurance policies on the property mortgages, see 4 Cooley, Briefs on Insurance, 3099–3703.

ness. A further examination of the subject, at the conclusion of the final hearing on an answer filed to the cross-bill, assures me that the above statement of the law, as recognized in this state, is accurate.

At the final hearing, no evidence was introduced in behalf of cross-complainant, in support of the averment of the cross-bill to the effect that the insurance in question had been effected by the mortgagee in pursuance of the agreement contained in the mortgage, and no evidence was introduced in behalf of the defendants to the cross-bill upon that subject. There is therefore an entire absence of any evidence to establish the fact that the insurance was effected by the mortgagee for the joint benefit of himself and his mortgagor, or at the mortgagor's expense, except the fact that the insurance was, in amount, in excess of the amount due on the mortgage, and that the mortgage authorized the mortgagee to effect insurance at the expense of the mortgagor, in the event of the failure of the mortgagor to keep the premises insured. I am entirely satisfied, under this condition of the evidence, that the claim of cross-complainant that the insurance was effected pursuant to the clause in the mortgage cannot be sustained. The clause in the mortgage gave to the mortgagee the option to take out insurance at the expense of the mortgagor, but did not compel him to do so. The mortgagee was at liberty to insure for the joint benefit of himself and his mortgagor at the expense of the mortgagor, or to insure at his own expense solely for his own benefit; and it is impossible to indulge the inference that the mortgagee did insure at the expense or for the benefit of the mortgagor, in view of the fact that the insurance effected by the mortgagee was, by its terms, solely for his "mortgagee interest."

It was urged in behalf of cross-complainant, however, that, as the clause in the mortgage authorized the mortgagee to insure at the expense of the mortgagor, the mortgagee was denied the privilege of insuring in any other manner, and a line of cases decided by the New York Court of Appeals was cited in support of that view; but I find nothing in the cases cited to support that proposition. On the contrary, in Foster v. Van Reed, 70 N. Y. 19, 26 Am. Rep. 544, it is held that such a provision in a mortgage does not prohibit or prevent an insurance by the mortgagee on his interest as mortgagee, at his own expense and in his own behalf.

I entertain the view, therefore, that the failure on the part of the cross-complainant to establish as a fact that the insurance in question was placed by the mortgagee at the expense of the mortgagor, or for the benefit of the mortgagor, or in any manner, or for any purpose, other than that which appears upon the face of the insurance policies, is operative to defeat the relief sought by cross-complainant. It follows that the insurance companies, in whose behalf this suit for the foreclosure of the mortgage

is brought, are entitled under the assignment of the mortgage from the mortgagee to enforce the mortgage lien. I reach this conclusion independently of the fact that the policies of insurance contained a clause providing for subrogation in behalf of the insurance companies in case of loss. It is therefore unnecessary to here determine whether these provisions for subrogations, which were annexed to the policies some days after the policies were issued, are effective.

I will advise a decree pursuant to the prayer of the bill.

REED et al. v. FIREMEN'S INS. CO OF NEWARK.

(Court of Errors and Appeals of New Jersey, 1911. 81 N. J. Law, 523, 80 Atl. 462, 35 L. R. A. [N. S.] 343.)

VOORHEES, J.[13] This is a suit on a fire insurance policy issued by the Firemen's Insurance Company to Ignatz Fabrikant, insuring him against direct loss or damage by fire on two frame buildings in Hoboken, N. J. The body of the policy contained the following: "Loss if any, payable to David F. and James A. Reed, mortgagees, mortgagee clause attached." The mortgagee clause, which was attached to the policy, as well as the policy itself, was the standard form.[14] The suit is brought by the mortgagee. The policy bears date

[13] See former appeal, 78 N. J. Law, 549, 74 Atl. 477 (1909).

[14] The standard mortgagee clause reads as follows: "Loss or damage, if any, under this policy, shall be payable to ——— as ——— mortgagee (or trustee), as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same. Provided, also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee), and unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void. This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease and this company shall have the right, on like notice, to cancel this agreement. Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall

October 9, 1903, and on February 25, 1905, the buildings were damaged by fire, as insisted by the plaintiff, to such an extent that they were past reparation, and so a total loss, while the defendant denied damage to so great an extent and insisted that the loss was only partial. On March 8, 1905, Fabrikant was notified by the building inspector of Hoboken under an ordinance of that city to raze the buildings within six days because of their dangerous condition. The owner sold the buildings to a dealer in secondhand building materials, who on or about April 9th or 10th caused them to be torn down.

The plaintiff in error relies for reversal principally upon the following points: That the interest of the insured Fabrikant was other than unconditional and sole ownership; that the loss was caused by order of civil authority, and not directly by fire; that the company is not responsible for so much of the loss as was occasioned by ordinance or law regulating the construction or repair of buildings, and that this was such loss, and that there was no proof by which the jury could distinguish between that loss and the loss by fire; that there was no proof of loss made by anybody, either mortgagor or mortgagee; that there was no appraisal by either mortgagor or mortgagee, although it was demanded by the company of both. In practically all of these points is involved the question: Is the mortgagee clause an independent contract? The contention that it is runs through all of the points made by the defendant in error, except the first point, which is a question of pleading. We have thought well to eliminate all question of pleading at once, for, in view of the conclusion arrived at on the merits, we may assume that the defendant is entitled to raise, under the pleadings as they exist, the several questions sought to be litigated.

We proceed, therefore, to examine the case upon the merits. The insistence of the defendant is that the mortgagee clause is not an independent contract, in the sense that none of the terms of the policy applies to the mortgagee, because it would then be unenforceable, because lacking certainty and completeness, because contrary to the intent manifested by the statute (P. L. 1892, p. 366; P. L. 1902, p. 407), providing for "agreements or additions as may be indorsed thereon or added thereto and form a part of such contract or policy," and because to construe this clause as a complete independent contract, without resort to the policy, is contrary to the words of the clause which refer to the policy, and would do violence to them. It must be admitted that the mortgagee clause is not an independent contract in the sense that none of the terms of the policy applies to it. It is not in itself complete, but becomes so by reading the policy in connection with it, and the reading of the two together does not clash with the notion that the mortgagee clause creates an independent contract be-

impair the right of the mortgagee (or trustee) to recover the full amount of ——— claim.

"Dated, ———.

"Attached to and forming part of Policy No. ———."

tween the company and the mortgagee. The policy furnishes the terms of the contract between the owner and the insurer. The mortgagee clause is the contract between the insurer, and the mortgagee, quite separate from the policy, yet ingrafted upon it, and to be understood by reference to the policy which renders it certain and complete. The policy, therefore, may be looked at for the purpose of showing what the mortgage contract refers to and establishes, which is quite different, however, from examining the policy for the purpose of defeating the ingrafted contract.

The Court of Appeals of New York in Eddy v. London Assur. Corp., 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686, referring to the mortgagee clause, says: "The controlling idea was a separate insurance of the mortgagee, freed from the conditions attached to the insurance of the owner, and not to be impaired or weakened by any act or neglect of such owner. * * * By taking the insurance in the manner the mortgagee herein did, instead of taking out a separate policy, all the provisions in the policy which from their nature would properly apply to the case of an insurance of the mortgagee's interest would be regarded as forming part of the contract with him, while those provisions which antagonize or impair the force of the particular and specific provisions contained in the clause providing for the insurance of the mortgagee must be regarded as ineffective and inapplicable to the case of the mortgagee." See, also, Smith v. Union Ins. Co., 25 R. I. 260, 55 Atl. 715, 105 Am. St. Rep. 882. The law which applied to the old form "loss if any payable, etc., to the mortgagee," inserted in the policy (Sun Ins. Co. v. Greenville B. & L. Ass'n, 58 N. J. Law, 367, 33 Atl. 962; Milliken v. Woodward, 64 N. J. Law, 444, 45 Atl. 796), is inapplicable to the standard mortgagee rider, and, although in the body of the present policy we find, as above noted, the former, yet it there refers in words to the attached mortgagee clause for the terms of the contract.

Our conclusion is that the standard mortgagee clause creates an independent contract of insurance for the separate benefit of the mortgagee ingrafted upon the main contract of insurance contained in the policy itself, and to be rendered certain, and understood by reference to the policy.

The next contention made in behalf of the company is that the mortgagee clause is not a contract to pay the mortgagee under any and all circumstances; that it safeguards him only against such an act or neglect of the owner as would invalidate the policy; and that, because the ownership of Fabrikant was "other than unconditional and sole," the title to the property being vested in him and his wife, the policy is void ab initio, because such untrue statement was a preexisting fact, and not an act or neglect of the insured. The argument is that, inasmuch as the clause declares that the insurance as to the interest of the mortgagee shall not be invalidated by any act or neglect of the mortgagor, this language must refer to acts or neglects of the

owner, occurring subsequently to the issuing of the policy, for a void policy could not be invalidated.

We have already determined that the contract insured the mortgagee's interest separately, and there appears to be an undoubted consideration for such contract, not dependent upon the contract with the owner. Therefore, admitting, for argument's sake, that the contract with Fabrikant was void, and never sprang into existence, because a condition precedent had been broken by him, yet there arises an estoppel in favor of the mortgagee against the company, precluding it from setting up that state of affairs to free itself from liability. It has independently promised to pay the mortgagee's loss, and has represented the instrument to be a policy, and has, by referring to it, made use of that instrument as a valid subsisting agreement for the purpose of more definitely, by such reference, manifesting its contract with the mortgagee. Therefore the wording of the clause should be taken distinctly to declare that the policy is valid and enforceable, and will so continue until rendered invalid by a subsequent act or neglect. The words of the clause, "loss shall be payable" amount to a waiver by the company, in favor of the mortgagee, of the effect of any prior or contemporaneous act of the owner which would have a vitiating effect upon the policy.

A similar argument was made in Syndicate Ins. Co. v. Bohn, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614. Judge Sanborn, writing the opinion for the United States Circuit Court of Appeals for the Eighth Circuit, had to deal with a policy which in that suit had, as against the owner, been declared void on the above ground. He then considers the validity of the insurance in favor of the mortgagee arising from a clause similar to that here under consideration. After tracing the evolution and history of policies intended to secure the interest of mortgagees, and of this clause, the learned judge says: "The inference is irresistible that they intended to, and that they did thereby, agree that no act or neglect of the mortgagors, unknown to the mortgagee, whether prior or subsequent to the date of this contract, should avoid it. Moreover, these insurance companies cannot now be heard to say that these contracts were void in their inception, as to the interest of the mortgagee. They tendered to this mortgagee their own policies running to third parties, and their contracts with the mortgagee that these policies should not be invalidated by any act or neglect of the parties. The policies had been issued by themselves, and any third party had the right to rely upon their statement as to the validity of their own policies. The policies certainly could not be invalidated unless they were then valid, and the tender of them to this mortgagee as contracts of insurance of its interest as mortgagee, with promises that they should not be invalidated, was a clear representation to the latter that those policies were then valid. The mortgagee undoubtedly relied upon this representation, and on the faith of it accepted the policies and

the mortgage clauses as binding agreements of indemnity. If the insurance companies had notified this mortgagee at any time before the loss that the original policies were or might have been invalid at the inception of the contracts between them, the latter would undoubtedly have surrendered the contracts, and sought insurance elsewhere. They waited until the loss had occurred, and it is now too late for them to retract their representations. They are estopped to deny the truth of their statement, to the manifest injury of the mortgagee." See, also, generally on this point 2 Cooley's Briefs on the Law of Insurance, p. 1228.

A policy of fire insurance in the standard form, which is void as to the assured owner, because of his breach of the warranty that his interest is not other than unconditional and sole ownership, may nevertheless be valid as to a mortgagee, when the mortgagee clause in the usual form is attached to the policy. * * *[15]

The next point made is that there was no proof of loss or appraisal made by either mortgagor or mortgagee. A provision for the submission of an appraisal as a prerequisite to a suit is legal. Wolff v. L. L. & Globe Ins. Co., 50 N. J. Law, 453, 14 Atl. 561; Hamilton v. L. L. & Globe Ins. Co., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419. The present policy provided that the said ascertainment—that is, of the actual cash value of the loss—should be made by the insured, and by the company. The effect of this clause was held to be a prerequisite to recovery in the case last cited.

The question is whether the mortgagee under the clause insuring him is exempted from the proof of loss and appraisal. The standard clause does not make it obligatory on the mortgagee to furnish proofs of loss, and the rule is stated by Clement on Fire Insurance, p. 206, to be: "Unless the mortgagee clause attached makes it obligatory on the mortgagee to furnish proofs of loss, he is not required to furnish them as a condition precedent to his right of action on the policy. The failure of the mortgagor or owner to furnish the proofs constitutes one of the neglects, from the invalidating consequences of which the mortgagee is exempt." The express terms of the policy limit the furnishing of such proofs to the insured. Therefore, a demand upon the mortgagee to do so is without the express agreement contained in the contract, and is not binding upon the mortgagee.[16] * * *

Judgment affirmed.[17]

[15] Part of the opinion relating to certain instructions to the jury is omitted.

[16] The remainder of the opinion, holding that the owner's sale of the débris after the fire could not affect the mortgagee's right to recover as for a total loss, is omitted.

[17] See, in accord, Heilbrunn v. German Alliance Ins. Co., 140 App. Div. 557, 125 N. Y. Supp. 374 (1910), affirmed by Court of Appeals, 202 N. Y. 610, 95 N. E. 823 (1911) In this case Scott, J., thus represents the state of the authorities on this vexed question: "The decision below rested upon the proposition that the plaintiff's assignor, although only a mortgagee, was bound, as a condition precedent to a recovery, to allege and prove that he,

V. Measure of Recovery

FULLER v. BOSTON MUT. FIRE INS. CO.

(Supreme Judicial Court of Massachusetts, 1842. 4 Metc. 206.)

Defendant, a mutual insurance company, was authorized by its charter to insure property only to the amount of three-fourths of its value. It issued a policy to one Jones for $2,000 upon his paper-mill and water-wheels, for one year, in consideration of a premium of $35. The policy stated that said $2,000 was "not more than three-fourths of the valuation of said building and wheels, as appears by the proposal of said Jones, lodged with the secretary of this company;" and Jones, in his proposal for insurance, did state the estimated value of said mill and wheels, exclusive of the land, to be $3,000. The policy was made on said estimate, a committee of the company having previously visited and examined the mill and wheels in company with Jones. Jones assigned the policy to the plaintiff with the consent of the company. The plaintiff, at the time of the loss, was interested in the property to the amount of $2,500 as mortgagee. The property having been destroyed by fire, the parties submitted the matter to arbitrators, who awarded to the plaintiff the whole amount insured. The defendants refusing to abide by the award, the plaintiff brought suit upon the policy. At the trial the Judge ruled that the award was obligatory upon the defendants, and that the estimate of the value of the insured property, in the proposal and policy, was conclusive, and must be taken as the true value.

or the mortgagor, had within the time prescribed by the policy, given to the defendant notice of the loss and furnished proofs of loss. Whether or not such an obligation rested upon the mortgagee is the crucial question involved in this appeal. The question has never been directly passed upon in this state, and in other jurisdictions there are decisions both ways. That no such obligation rests upon a mortgagee has been held in Northern Assurance Co. v. Chicago Mutual Bldg. & Loan Ass'n, 98 Ill. App. 152 (1901), affirmed 198 Ill. 474, 64 N. E. 979 (1902); Queens Ins. Co. v. Dearborn Savings Loan & Bldg. Ass'n, 75 Ill. App. 371 (1898), affirmed 175 Ill. 115, 51 N. E. 717 (1898); Dwelling House Ins. Co. v. Kansas Loan, etc., Co., 5 Kan. App. 137, 48 Pac. 891 (1897); Glens Falls Ins. Co. v. Porter, 44 Fla. 568, 33 South. 473 (1902); Adams v. Farmers' Mut. Ins. Co., 115 Mo. App. 21, 90 S. W. 747 (1905). On the other hand, it has been held that a mortgagee must furnish proofs of loss in Lombard Invest. Co. v. Dwelling House Ins. Co., 62 Mo. App. 315 (1895), apparently overruled by Adams v. Farmers' Mut. Fire Ins. Co., supra; Southern Home Bldg. & Loan Ass'n v. Home Ins. Co. of New Orleans, 94 Ga. 167, 21 S. E. 375, 27 L. R. A. 844, 47 Am. St. Rep. 147 (1894); American, etc., Ass'n v. Farmers' Ins. Co., 11 Wash. 619, 40 Pac. 125 (1895). To the same effect is Union Inst. for Savings v. Phœnix Ins. Co., 196 Mass. 230, 81 N. E. 994, 14 L. R. A. (N. S.) 459, 13 Ann. Cas. 433 (1907), although the precise point was not involved."

The dissenting opinion of Laughlin, J., in this case is carefully reasoned. In Union Inst. for Savings v. Phœnix Ins. Co., supra, it was held that the mortgagee was required to give notice and proofs of loss within a reasonable time, not necessarily within the period stipulated in the policy.

Shaw, C. J. Assumpsit on a policy of insurance against fire, in which the plaintiff relies upon the original cause of action, and also on an award. The plaintiff sues, in effect, as assignee; but as the assignment was made with the consent of the defendants and as a part of the original contract, and as it is found that the plaintiff was interested, as mortgagee, to the amount of the whole sum insured, we see no reason why he cannot maintain the action in his own name; and his right so to do has not been contested on that ground.

Several questions have been argued; one of them, and a principal one, is, whether the valuation of the property, as stated in the policy, under the circumstances is to be deemed conclusive evidence of the actual value, for the purpose of adjusting the loss.

It is not contended that there was any designed or fraudulent overvaluation or any collusive valuation or any willful misrepresentation of the value. The case arises upon a policy made by a mutual insurance company that had no authority to insure over three-fourths of the value of the buildings. In regard to all property lying out of the city of Boston, the mode taken to ascertain the value was this: the assured made a statement in writing—in answer to certain standing questions, in compliance with the by-laws of the company—of the situation, circumstances, and value of the buildings proposed to be insured, which was filed and remained with the company. By the 7th article of the by-laws, it would be the duty of the president to visit and examine the buildings, alone or jointly with a director, and fix the sum to be taken thereon, and the rates of insurance. As this company was established at Boston, it was to be expected that the greater portion of risks would be taken in Boston; and the by-laws were adapted to meet that expected state of things; but they made no special provision for examining buildings out of the city. But this indicates the general policy of the company; and in point of fact, it appears, in the present case, that a like examination was made by a committee of the directors, and for the like purpose.

In determining what amount shall be insured, the company necessarily determine the value of the building, or rather they fix a valuation, over which it shall not be rated, for the purpose of insurance. Being limited to insure not exceeding three-fourths of the value, in determining the sum to be insured, they by necessary consequence fix a valuation at such a sum that the sum insured shall not exceed three-fourths of it. The result is that as the valuation is thus proposed on the one side, and after the proposition is considered and modified, it is acceded to on the other, and the amount insured, and at the rate of premium, assessment and liability, established on the same basis, it is, in the highest sense, a valuation by mutual agreement.

Then the question is, whether a valuation thus deliberately and carefully made by mutual agreement, as a part of the original negotiation —when each party is independent of the other, and at liberty to contract or not, as they are or are not respectively satisfied with the terms

—shall, in the absence of all fraud, collusion, and misrepresentation, be taken as the best evidence of the actual value of the premises insured. See Borden v. Hingham Mutual Fire Ins. Co., 18 Pick. 523, 29 Am. Dec. 614.

The same reason, which applies to other cases of contract, applies to this; and the general rule is that parties capable of contracting, and who enter into a contract, without fraud or imposition, are bound by law to abide by it.

One of the principal objections is, that the defendants are a corporation, and that a corporation can only act within the scope of the authority conferred upon them; and that by their act of incorporation, this company can only insure three-fourths of the value of the property; and if they can show that a contract, in its terms proposes to bind them to a responsibility for a greater amount, they may show it in defense, and reduce the amount to that, for which alone they can make themselves liable. This, as I understand it, is the strength of the argument. But admitting its full force, we think it does not shake the position, that a valuation, fairly and deliberately made, is binding on them. The defendants were incorporated for the express and indeed for the sole purpose of insuring each other against loss by fire. Like all other trading or negotiating corporations, being invested with power to make a particular class of contracts, they are invested with all the incidental powers necessary to carry into effect the objects and purposes for which the corporation was created. In giving them power to insure a certain proportion of the value of buildings, the Legislature necessarily clothed them with the power, at some time and in some mode, to determine such value, or to enter into suitable and proper arrangements for fixing it. Whether this shall be done by their own officers, or by referees mutually agreed on; whether before or after the contract entered into; is a question of expediency, not of power. If they had not power, in some mode, to fix the value, they never could make an adjustment which might not be overreached by a suit, in which the question of value must be submitted to a jury. Such valuation by the appraisement of indifferent men, or such adjustment after a loss, would always be open to the same objection as this valuation; which is, that though the officers of the corporation have assented to the valuation, yet if it is an over-valuation, or if, in other words, it can be shown, to the satisfaction of a jury, to be an over-valuation, it is void as against the corporation. But we think the true answer is this: that a valuation deliberately and honestly fixed by agreement, a valuation by which the premium and assessments to be paid by the assured are fixed, as well as the amount to be paid by the company in case of loss, is the best evidence of the actual value. Suppose a claim on a policy for a loss, and that the company might perhaps have successfully defended, on the ground that the loss was one for which they were not liable—as by fire caused by civil war or insurrection—and the parties should agree to an adjustment by

compromise or arbitration: Such adjustment would, we think, be binding; and yet its binding force would be derived wholly from the agreement. It being once admitted that they are a body having the faculty to contract, we think it follows, that they have power, by their regular agents and officers, to make all such subsidiary and incidental contracts and agreements, both in making the principal contract, and afterward in adjusting and executing it, as are necessary to accomplish the main purpose and object of their incorporation.

Being of opinion that the valuation, under the circumstances, was conclusive, it becomes unnecessary to consider the other branch of the case, or the effect of the award. The fact that the present plaintiff was no party to the submission, would seem to be a formidable objection to his recovering upon it; but, for the reason stated, we give no opinion on that point, and only make this remark, to show that we place no reliance on that award, in rendering judgment for the plaintiff.

REILLY v. FRANKLIN FIRE INS. CO.

(Supreme Court of Wisconsin, 1877. 43 Wis. 449, 28 Am. Rep. 552.)

Action on certain policies insuring the plaintiff against loss or damage to his hotel in Oshkosh to the amount of $10,000, a total loss being alleged. Defendant's answer alleged that the value of the property insured did not exceed $7,469.42, and denied liability beyond that sum. Defendant appealed from an order sustaining a demurrer to this answer.

COLE, J. I. The material part of the answer to be considered on the demurrer is, the allegation that the policy provided that in case of fire the loss or damage should be established according to the true and actual cash marketable value of the property when the loss happened; and that the true and actual cash marketable value of the property, at the time of the fire, was less than the amount of insurance on the property. It is claimed that this shows a partial defense to the action. The insured building was a brick hotel, which was wholly destroyed. The policy was issued after ch. 347, Laws of 1874, took effect, and the case therefore necessarily involves a construction of that statute, and its application to the answer. The act of 1874 is entitled "An act to regulate insurance companies," and provides that in all cases where an individual or company authorized by the laws of this state to take risks, issue policies and transact the business of insurance in this state, shall insure or issue a policy of insurance against loss by fire upon the real property of any individual or corporation in this state, and the property so insured shall be wholly destroyed without criminal fault on the part of the assured, the amount of insurance written in the policy "shall be taken and deemed the true value of the property at the time of such loss, and the amount of the

loss sustained by the individual or corporation in whose favor the said policy was issued, and such amount shall be taken and deemed the measure of damages."

The words of this statute are neither obscure, doubtful nor ambiguous as to their meaning, and they therefore afford but little room for interpretation. In clear and precise terms they make, in case of total loss of real property without criminal fault of the assured, the amount of insurance written in the policy, the value of the property at the time of loss; and that amount is fixed as the measure of damages. It is analogous to a valued policy; only here the statute peremptorily declares what shall be deemed to be the real value of the property at the time of loss, and what sum shall be paid as indemnity. And as the intention of the legislature is obvious the statute clearly prescribing that the amount of insurance written in the policy shall be deemed the true value of the property at the time of loss, it results that the above allegation is bad and shows no defense. For if the statute is to have effect as enacted, nothing is left open in the case to proof; "the true and actual cash marketable value of the property" at the time it was destroyed, is not a matter to be inquired into, as the amount of insurance written in the policy determines the amount of loss and fixes the extent of the recovery.

The ingenious counsel for the defendant insisted that the statute intends, and should be construed as only to mean, that the amount of insurance written in the policy shall be taken as prima facie the value of the property, so as in case of total loss, to place the onus of proving the real value upon the insurer instead of the insured. But this construction seems quite inadmissible in view of the language, which expressly declares, not only that the amount of insurance written in the policy shall be taken and deemed as the true value of the property at the time of the loss, but that "such amount shall be taken and deemed the measure of damages." It will be seen that the statute adopts the amount of insurance written in the policy as the rule of damages, or amount of compensation, leaving no question open as to what in fact was the real value of the property destroyed.

The manifest policy of the statute is to prevent over-insurance, and to guard, as far as possible, against carelessness and every inducement to destroy property in order to procure the insurance upon it. Where property is insured above its value, a strong temptation is presented to an unscrupulous and dishonest owner, either to intentionally burn it, or not to guard and protect it as he ought. Not sharing in the risk, with the insurer, it is for his advantage that it be destroyed; and it often is destroyed with other property, when it would not have been but for the fact of such excessive insurance. And insurance companies, too, actuated by motives of gain, or incited by sharp competition in business, take risks, frequently, recklessly and for amounts in excess of the real value of the property insured; which they would be less likely to do if compelled to pay the amount of insurance writ-

ten in their policies. It is evident that it was to prevent these evils and guard against these mischiefs, that the statute was enacted. Its policy seems to be wise and wholesome; but if it were not so, it is not the province of the court to emasculate the law by any nice or forced construction of its language. As it stands, it clearly makes the amount of insurance written in the policy the measure of the value of the property and the rule of damages. And, as the meaning and intent of the statute are clear, effect must be given to it, certainly as regards this class of property. The measure of damages, therefore, being fixed by the statute, the company had no right to show that the assured sustained a loss less than the amount written in the policy.

II. But the counsel further contends that, by reason of the stipulation in the policy, the statute does not apply and cannot govern as to the extent of the defendant's liability. It is said the parties were abundantly able to contract for themselves; that they restrict or change the rule provided by the statute; and that the assured did expressly waive that rule, by agreeing that the loss should be established according to the true and actual cash marketable value of the property when destroyed. We have no doubt that the statute applies to the policy; and so far as there is any conflict or inconsistency between it and the provisions of the policy, the statute must control.[18] * * *

We have said that the legislature seems to have enacted the law of 1874 to prevent or do away with, as far as possible, the great evils and mischiefs arising from over insurance. Consequently, on grounds of public policy and in order to accomplish that end, it was provided that the amount of insurance written in the policy should be conclusive as to the value of the real property destroyed.

Now the law is well settled, that where a statute is founded upon public policy, a party cannot waive its provisions even by express contract. "The contracts of private persons cannot alter a rule established on grounds of public policy." Emery v. Piscataqua F. & M. Ins. Co., supra (52 Me. 322); Sedgw. Stat. Con. Law, p. 70. The law of 1874 must be regarded as though written in the policy itself; and the stipulation that the loss shall be established according to the actual cash marketable value of the property when destroyed, being in conflict with the rules of damages prescribed by the statute, must fall. The counsel argued that the same rule obtains here as in cases where common carriers have restricted their common-law liability by special agreement. But the cases are not analogous, for very obvious reasons. Where the owner, in consideration of paying a less rate, agrees to relieve the carrier from his liability as insurer of the property, no principle of public policy may be violated. But suppose he should con-

[18] The court here cites in support of its position White v. Conn. Mut. Life Ins. Co., 4 Dill. 177, 5 Cent. Law J. 486, Fed. Cas. 17,545 (1877), Emery v. Piscataqua F. & M. Ins. Co., 52 Me. 322 (1864), and Chamberlin v. Ins. Co., 55 N. H. 249 (1875), and disapproves of Farmers', etc., Ins. Co. v. Curry, 10 Chicago Leg. News, 43 (1877).

tract to exempt the carrier from liability for gross negligence? It would not be difficult to find respectable decisions which would condemn such a contract as unreasonable and contrary to public policy.

It will be noticed that the statute relates solely to insurance upon real property, which the parties can see and fix a value upon when the insurance is effected. If companies exercise the care which it is for the public interest they should use in making the valuation, there will be no danger of excessive insurance.

We were referred to some cases in Massachusetts bearing upon the question under consideration; but as we do not rest our decision upon them, we will only remark that they hold, for example, that where the policy states that the amount insured is three-fourths of the value of the property as stated by the applicant, the valuation thus agreed upon by the parties is conclusive, in the absence of fraud. See Luce v. Dorchester Ins. Co., 105 Mass. 297, 7 Am. Rep. 522; Brown v. Quincy Ins. Co., 105 Mass. 396, 7 Am. Rep. 538.

The order sustaining the demurrer to the answer is affirmed, and the cause remanded for further proceedings.[19]

WASHINGTON MILLS EMERY MFG. CO. v. WEYMOUTH & BRAINTREE MUT. FIRE INS. CO.

(Supreme Judicial Court of Massachusetts, 1883. 135 Mass. 503.)

[The statement of facts and part of the opinion will be found reported ante, p. 280.]

MORTON, C. J. * * * 4. The other rulings requested relate to the question of damages.

The auditor adopted as the rule of damages, that the plaintiff is entitled to recover the actual intrinsic cash value of the property destroyed, and to such a sum as it would have cost at the time of the fire to have replaced and restored the property to the condition in which it was before, without regard to the fact that it was to be removed on the first day of October; and he found such value to be more than the insurance. He also found in the alternative, that, if the rule was that the plaintiff could recover only the relative value to the plaintiff of the building subject to removal before October 1, 1878, then such value was $400. It seems to us clear that the

[19] In accord with the principal case, see Hartford Fire Insurance Co. v. Bourbon County Court, 24 Ky. Law Rep. 1850, 72 S. W. 739 (1903); Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45 (1890); Hickerson v. Insurance Co., 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172 (1896). In Hartford Fire Ins. Co. v. Bourbon County Court, supra, it was held that not only was the provision of the policy limiting the liability of the insurer to the cash value of the property rendered invalid by the valued policy statute, but also that a clause giving the company the option of rebuilding was repugnant to the same statute.

last rule does not furnish the plaintiff an indemnity according to the contract of the parties. Even if the rule were that the insured could recover only the actual ultimate loss in money to him caused by the fire, the market value of the buildings subject to removal would not be a fair test of such loss. It might be of great importance to him that he should have the use of the buildings up to October 1, for the completion of contracts and for carrying on his manufacture, and so the actual loss caused by the fire might be large. Besides, there was the possibility, and in this case the great probability, that the insured could by an arrangement with the city of Boston extend his lease or license to occupy the land for a longer period. But we do not think that in adjusting a loss, the true rule of indemnity is to ascertain what the actual loss to the plaintiff is, or in other words, to what extent he has suffered by the fire. It often happens that the insured may gain an advantage by the fire, by reason of some collateral contracts or relations with other parties. Thus, a mortgagee has an insurable interest in the mortgaged property; he may insure his interest generally, and need not disclose the peculiar nature of it, unless inquired of; and, in case of loss, he is entitled to recover to the amount of his debt, and apply the money to his own use, not accounting with the mortgagor, and it is no defense that his title is a defeasible one, or that he suffers no actual loss by the fire because his security remains sufficient. King v. State Ins. Co., 7 Cush. 1, 54 Am. Dec. 683; Suffolk Ins. Co. v. Boyden, 9 Allen, 123. This was so held in a case where the mortgagor had repaired the building before the commencement of the suit, so that it was made as valuable as it was before the fire. Foster v. Equitable Ins. Co., 2 Gray, 216. So the market value of the property burned is not always a fair rule of adjustment. The contract of the insurer is not that, if the property is burned, he will pay its market value; but that he will indemnify the assured, that is, save him harmless, or put him in as good a condition so far as practicable, as he would have been in if no fire had occurred.

In the case before us, we think the rule adopted by the auditor is the true rule. It complies with the letter and spirit of the contract, and is the only rule which will give full indemnity to the assured without injustice to the insurer. It would work an exact indemnity if the insurer could have, on the day after the fire, replaced the buildings in the same condition they were in before the fire. The insured would then have been saved harmless, and would have neither gained nor lost by the fire. This is not practicable, but the rule adopted by the auditor is as near an approach to this exact indemnity as is practicable. The insurer cannot complain if he pays no more than the value of the property he has insured, no more than the sum insured upon it, and no more than the interest

of the insured at the time of the loss. He thus pays no more than an indemnity under his contract. It is no defence to him that the loss may, by reason of other collateral and independent contracts, give an advantage to the insured.

Chancellor Kent in his Commentaries states the rule to be, that, "if a tenant erects a building on a lot held under a lease, with liberty to renew or remove the building at the end of the lease, and the building be destroyed by fire a few days before the end of the lease, though the building as it stood was worth more than the sum insured, and if removed, would have been worth much less, yet the courts look only to the actual value of the building as it stood when lost, and they do not enter into the consideration of these incidental and collateral circumstances, in fixing the true standard of indemnity;" and he cites with approval the well considered case of Laurent v. Chatham Ins. Co., 1 N. Y. Super. Ct. 45; 3 Kent. 376.

The case at bar is governed by the same principles; and a majority of the court is of opinion that the ruling of the Superior Court, that, upon the facts proved, the plaintiff was entitled to recover the whole amount insured upon the buildings destroyed, was correct.

Judgment on the verdict.[20]

[20] In accord with the principal case are those holding that the life tenant insuring solely for his own benefit recovers the actual value of the property destroyed. Merrett v. Farmers' Insurance Co., 42 Iowa, 11 (1875); Franklin Insurance Co. v. Drake, 2 B. Mon. (Ky.) 47 (1841); Trade Ins. Co. v. Barracliff, 45 N. J. Law, 543, 46 Am. Rep. 792 (1883). See 11 Harv. Law Rev. 512; 10 Law Quar. Rev. 512. The reason for this holding is thus expressed by the court in Convis v. Citizens' Mut. Fire Ins. Co., 127 Mich. 616, 623, 86 N. W. 994 (1901): "It is next urged by the defendant corporation that the company is responsible only for the value of her life estate in the building destroyed. This would virtually destroy the use of her life estate, for she could not replace the building for the present value of her interest in money based upon the value of that estate. The company insured this property knowing that the land of which it was a part, and the principal part in value, was her homestead; that she was entitled to its use; that it would be of little value to her without the house; and that she would be entitled to the full amount of the insurance, to enable her to rebuild, so that she might enjoy and use the property. The insurer has not been deceived. It understood that it was insuring for the full value, and intended to do so. Its defense is technical, and without merit."

In Kludt v. German Mut. Fire Ins. Co., 152 Wis. 637, 140 N. W. 321, 45 L. R. A. (N. S.) 1131 (1913), a husband, who was living with his family in a house belonging wholly to his wife, took out insurance thereof in his own name. The court said: "In the instant case, however, the deceased had an insurable interest, and the contract of insurance insured the property, not his interest. There is nothing in the policy or circumstances of the case to indicate that the deceased insured his interest merely. The loss was total, and the value of the property insured was in excess of the amount for which the property was insured. The damages recoverable, therefore, are the sum for which the property was insured. 19 Cyc. 839; Horsch v. Dwelling H. Ins. Co., 77 Wis. 4, 45 N. W. 945, 8 L. R. A. 806 (1890); St. Clara F. A. v. Northwestern N. Ins. Co., 98 Wis. 257, 73 N. W. 767, 67 Am. St. Rep. 805 (1898); Siemers v. Meeme M. H. P. Ins. Co., 143 Wis. 114, 126 N. W. 669, 139 Am. St. Rep. 1083 (1910); Johnston v. Abresch Co., 123 Wis. 130, 101 N. W. 395, 68 L. R. A. 934, 107 Am. St. Rep. 995 (1904); Andes Ins. Co. v. Fish, 71 Ill.

SECTION 2.—LIFE INSURANCE

I. Beneficiaries

RICKER v. CHARTER OAK INS. CO.

(Supreme Court of Minnesota, 1880. 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289.)

Cornell, J. The original policy was issued upon the application of Samuel Stanchfield, the person whose life was insured, and all the premiums stipulated for were paid by him before the death of Elizabeth A. Stanchfield, who was his wife. By its terms the amount of the insurance was made payable, upon the death of the insured, to Elizabeth A. Stanchfield, his said wife, and, in case of her death before his decease, the same was to be paid to his children, or to their guardian, if minors, for their use and benefit. The said Elizabeth died intestate in July, 1874, leaving surviving her said husband, the plaintiffs herein, and one Joel B. Stanchfield, who were the issue of their marriage. After this Samuel Stanchfield married the intervenor herein, by whom he had one child, Carl S. Stanchfield, both of whom are now living. On February 13, 1878, Samuel Stanchfield died. After the decease of his former wife and his marriage with the intervenor, Louisa Stanchfield, the insured surrendered the original policy, which was cancelled, and a new one was issued in its place and as a substitute therefor, bearing the same date, and containing the same terms and conditions, save that it was therein provided that it should inure "to the sole and separate use and benefit" of said intervenor, Louisa Stanchfield, his second wife. The legal effect of this surrender and change, and the competency of Samuel Stanchfield to make it without the consent of his children, are the important questions presented for adjudication in this case.

Upon the allegations and admissions in the pleadings it must be presumed that the original policy was made, and its stipulations were to be performed, in the State of Connecticut, where the defendant company was created, organized, and did its business, and hence its legal effect, and the rights and obligations of the parties

620 (1874). It seems to be well settled that, in the absence of fraud or mistake, where the insured had an insurable interest at the time the policy is issued, and there is no limitation in the policy, and the insurable interest continues to the time of loss, the whole amount of the damage done to the property, not exceeding the amount for which it is insured, may be recovered. It follows that the judgment must be affirmed."

But in a few jurisdictions the insured is limited to the value of his interest as tenant. See Doyle v. Insurance Co., 181 Mass. 139, 63 N. E. 394 (1902); Beekman v. Insurance Co., 66 App. Div. 72, 73 N. Y. Supp. 110 (1901).

under it, depend upon the laws of that State; but as no evidence appears to have been given as to what those laws were, they are to be taken as identical with the common law of this State, independent of any statute upon the subject. Upon this theory the case has been argued, and it will be considered and determined accordingly.

The general rule upon the subject, as stated by Mr. Bliss, is this: "That a policy of life insurance, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person or persons so named. The person designated in the policy is the proper person to receipt for and to sue for the money. The principle is that the rights under the policy become vested immediately upon it being issued, so that no person other than those designated in it can assign or surrender it, and that in such assignment or surrender all the persons must concur, or the interest of those not concurring is not affected." Bliss on Life Ins. (2d Ed.) §§ 317, 337. This is held to be the rule in Succession of Kugler, 23 La. Ann. 455.

Upon the facts in the case at bar, however, the Court is not called upon to consider the rule as applied to a case where a portion of the premiums which constitute the consideration for the insurance still remains unpaid, and where the policy is liable to forfeiture in case of non-payment. Here the entire amount of the premiums stipulated for in the policy had been paid before the death of the wife, Elizabeth A. Stanchfield, and the subsequent attempted surrender of the policy by her husband, whose life was insured. The case, therefore, stands in the same position it would if the whole consideration for the policy had been paid by the party procuring it at the time of its execution and delivery by the company; and the question is, whether, having made such payment, and taken out a policy for the benefit of his said wife and his children, payable in express terms to her, or, in the event of her prior decease, to his children, it was competent for him to surrender the same and take another policy in consideration of such surrender, and in lieu of the original, for the benefit of another party?

This question, it seems to the Court, must be answered in the negative. The transaction on the part of Mr. Stanchfield was in the nature of an irrevocable and executed voluntary settlement upon his wife and children of the sum secured to be paid by the policy at his death, conditioned that the same should be paid to her for her benefit should she survive him; but, if not, then the same should be paid to his children, or, if minors, to their guardian, for their sole use and benefit. Nothing remained to be

done on his part to make the intended gift of the policy to the beneficiaries therein named complete and effectual as against himself and all mere volunteers claiming under him. In paying for the insurance and procuring the policy to be issued, payable in express terms, upon his death, to his said wife, Elizabeth, if then living, and if not to his children, for their sole use and benefit, without any condition or stipulation reserving a right to change or alter any of the terms of the agreement, he did all that could well be done, under the circumstances, in the execution of an intention to vest in his said appointees the entire interest in the policy, and all rights thereunder. Adams v. Brackett, 5 Metc. (Mass.) 280; Landrum v. Knowles, 22 N. J. Eq. 594.

What he did was a "clear and distinct act," wholly divesting himself of all ownership or control over the money paid for the insurance, disclaiming any interest in the policy, or intention to take or hold it for himself or his legal representatives, at the same time putting it beyond his power so to do, by the stipulation obligating the company to pay the sum insured, whenever it should become due, to such of the persons named in the policy as might then be entitled thereto by its terms. Taking the delivery of the policy from the company, under these circumstances, can only be construed as an act of acceptance for the designated beneficiaries, and his subsequent holding of the same as that of a naked depositary, without any interest, for those entitled thereto. Such conduct on the part of the husband and father was both natural and proper, and it raises no presumption against the theory of a completed transaction on his part, as evidenced by his other acts. As the insured had no legal or equitable interest in the policy at the time of its surrender and cancellation, the act was a nullity, and could not affect the rights of his children, to whom it then belonged, and who alone could release the company from the obligations it contained.[21]

We concur in the opinion of the District Court that "his children" included the issue of both marriages. Order affirmed.

[21] Although the doctrine that the beneficiary of a life insurance policy has a vested interest therein, which cannot be defeated by the insured, is a comparatively recent one, its origin is obscured, and there is great confusion as to the theory upon which it is based. 2 Harv. Law Rev. 239; 9 Harv. Law Rev. 542; 13 Harv. Law Rev. 682; 15 Harv. Law Rev. 417; 6 Va. Law Reg. 366.

In England it would seem that, save as to those beneficiaries who come within the provisions of section 11 of the Married Women's Property Act of 1882, the beneficiary takes no interest in the policy procured by the insured. See Cleaver v. Mutual Reserve Fund Life Association, [1892] 1 Q. B. 147, in which Lord Esher, M. R., said: "Apart from the statute, what would be the effect of making the money payable to the wife? It seems to me that as between the executors and the defendants it would have no effect. She is no party to the contract; and I do not think that the defendants could have any right to follow the money they were bound to pay and consider how the executors might apply it. It does not seem to me that, apart from the

statute, such a policy would create any trust in favor of the wife. James Maybrick [the insured] might have altered the destination of the money at any time, and might have dealt with it by will or settlement. If he had done so, the defendants could not have interfered. I think that, apart from the statute, no interest would have passed to the wife by reason merely of her being named in the policy; and, if the husband wished any such interest to pass to her, he must have left the money to her by will or settled it upon her during his life, otherwise it would have passed to his executors or administrators."

The English view also obtained in Wisconsin, as appears by the following extract from the opinion of Dixon, C. J., in Clark v. Durand, 12 Wis. 224 (1860): "The true criterion by which to determine whether the plaintiff had any interest in the moneys received upon the policy would seem to be whether, during her life, he had such an interest in it as would enable him to compel Mrs. Clark, or the defendant as nominal trustee, to keep up the premiums, upon the prompt payment of which its validity and value depended, or as would have enabled him to restrain or prevent her and the defendant from entering into and consummating the bargain which they did in relation to it. It is very evident that he was no party to the policy or the agreement by which it was procured. The only parties, real and nominal, were the defendant, Mrs. Clark, and the company. He furnished no part of the consideration upon which the policy was issued. If it was her intention, at the time she procured it, as it undoubtedly was, to have the money due upon it at her decease paid over to him, or applied to his benefit, yet she was under no obligation, legal or equitable, to obtain it, or to keep it up after it was obtained."

This doctrine, as affirmed in a long series of decisions by the Wisconsin courts, persisted until changed by statute in 1891. See Ellison v. Straw, 116 Wis. 207, 92 N. W. 1094 (1902), and cases cited therein.

The Wisconsin statute above referred to, chapter 376, Laws 1891 (section 2347, Rev. St. 1898), providing that the interest of the wife, named as beneficiary in the policy of her husband, should be a vested right, was held in Boehmer v. Kalk, 155 Wis. 156, 144 N. W. 182, 49 L. R. A. (N. S.) 487 (1913), to be unconstitutional in so far as it sought to change the rights of parties to policies issued prior to its enactment.

In Massachusetts, prior to the enactment of St. 1894, c. 225, changing the judicial rule, it was likewise held that, since the contract was made with the insured and not with the beneficiary, there was no privity of contract with the latter and that he could maintain no action thereon. Wright v. Vermont Life Ins. Co., 164 Mass. 302, 41 N. E. 303 (1895); King v. Cram, 185 Mass. 103, 69 N. E. 1049 (1904). In accord with this view it was held in Nims v. Ford, 159 Mass. 575, 35 N. E. 100 (1893), that the beneficiary's interest in the policy was only of an equitable nature, which could not be reached by a trustee process.

Endowment Policies.—The doctrine that the beneficiary's interest is vested has been extended to endowment policies. Thus, in Succession of Desforges, 135 La. ——, 64 South. 978 (1914), it was held that money paid under a matured endowment policy to the insured, who had paid all the premiums, and invested by him as his own, nevertheless was the separate property of his wife, who was named as beneficiary in the policy.

Murder of the Insured by the Beneficiary.—It is well settled, both in this country and in England, that a beneficiary who feloniously causes the death of the insured cannot recover on the policy. See New York Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997 (1886); Schmidt v. Northern Life Ass'n, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323 (1900); New York Life Ins. Co. v. Davis, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305 (1899); Filmore v. Metropolitan Life Ins. Co., 82 Ohio St. 208, 92 N. E. 26, 28 L. R. A. (N. S.) 675, 137 Am. St. Rep. 778 (1910); Cleaver v. Reserve Life Ass'n, [1892] 1 Q. B. 147. It is also uniformly held that the murder of the insured is not an absolute defense to the insurer, but that the personal representatives of the insured can recover for the benefit of the estate the amount of the policy. In England, where the beneficiary is considered to have only an equitable interest in the policy, it is logically enough held that, since his inequitable conduct has defeated his

WASHINGTON CENTRAL NAT. BANK et al. v. HUME et al.

(Supreme Court of the United States, 1888. 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370.)

Thomas L. Hume died on October 23, 1881, leaving the following policies of insurance upon his life outstanding: (1) One issued by the Life Insurance Company of Virginia in 1872, for $10,000, payable to his wife and children; (2) five issued by the Hartford Life & Annuity Company in 1880, for $1,000 each, payable to his wife if living, otherwise to his legal representatives; (3) one issued by the Maryland Life Insurance Company in 1881, for $10,000, payable to his wife, "the insured"; (4) one issued by the Connecticut Mutual Life Insurance Company in 1881, for $10,000, payable to his wife and children. By the terms of the two last policies, Anna G. Hume, wife of Thomas L. Hume, appeared as the contracting party. In addition to the foregoing policies, there was one for $5,000 payable to Hume's estate, which had been duly paid to his administrators, and is not involved in this litigation. Hume having died deeply insolvent, divers proceedings were instituted by or on behalf of his creditors, to have the proceeds of the several policies declared assets of the decedent's estate and thus made available to his creditors. The suits being consolidated, evidence was given tending to prove that Hume had really been insolvent since 1874, although his business continued to be actively carried on until two days before his death: and that Hume had received from his wife's mother sums abundantly adequate to meet the premiums of the policies taken out in 1880 and 1881.

The court decreed that the administrators should recover all sums paid by Thomas L. Hume as premiums on all said policies, including those on the Virginia policy from 1874; and that, after deducting said premiums, the residue of the money paid into court (being that received from the Maryland and the Connecticut Mutual) be paid to Mrs. Hume individually, or as guardian for herself and children; and that the Hartford Life & Annuity Company

rights to the fund, the trust results in favor of the estate of the insured. See Cleaver v. Reserve Life Ass'n, supra. In the United States, however, where the beneficiary is generally held to have a vested legal interest, the principle upon which the amount of the policy should be held to become payable to the insured's estate is not so clear. See Anderson v. Life Ins. Co., 152 N. C. 1, 67 S. E. 53 (1910). In Metropolitan Life Ins. Co. v. Shane, 98 Ark. 132, 135 S. W. 836 (1911), and in Filmore v. Metropolitan Life Ins. Co., supra, it was held that the murder of the insured by the beneficiary was an impliedly excepted risk in so far as the beneficiary was concerned. It is hard to see how a risk can be impliedly excepted as to one party, and not excepted as to another, since the implied exception limits the liability assumed by the insurer. See Vance on Insurance, p. 392; notes in 14 Harv. Law Rev. 375, and 24 Harv. Law Rev. 227, 241.

pay over to her the amount due on the certificates issued by it. From this decree appeals and cross-appeals were duly prosecuted.[22]

Mr. Chief Justice FULLER delivered the opinion of the court.

No appeal was prosecuted from the decree of January 4, 1883, directing the amount due upon the policy issued by the Life Insurance Company of Virginia to be paid over to Mrs. Hume for her own benefit and as guardian of her children, nor is any error now assigned to the action of the court in that regard. Indeed, it is conceded by counsel for the complainants that this contract was perfectly valid as against the world, but it is insisted that, assuming the proof to establish the insolvency of Hume in 1874 and thenceforward, the premiums paid in that and the subsequent years on this policy belonged in equity to the creditors, and that they were entitled to a decree therefor, as well as for the amount of the Maryland and Connecticut policies, and the premiums paid thereon. It is not denied that the contract of the Maryland Insurance Company was directly between that company and Mrs. Hume, and this is, in our judgment, true of that of the Connecticut Mutual, while the Hartford company's certificates were payable to her, if living.

Mr. Hume having been insolvent at the time the insurance was effected, and having paid the premiums himself, it is argued that these policies were within the provisions of 13 Eliz. c. 5, and inure to the benefit of his creditors as equivalent to transfers of property with intent to hinder, delay, and defraud. The object of the statute of Elizabeth was to prevent debtors from dealing with their property in any way to the prejudice of their creditors; but dealing with that which creditors, irrespective of such dealing, could not have touched, is within neither the letter nor the spirit of the statute. In the view of the law, credit is extended in reliance upon the evidence of the ability of the debtor to pay, and in confidence that his possessions will not be diminished to the prejudice of those who trust him. This reliance is disappointed, and this confidence abused, if he divests himself of his property by giving it away after he has obtained credit. And where a person has taken out policies of insurance upon his life for the benefit of his estate, it has been frequently held that, as against creditors, his assignment, when insolvent, of such policies, to or for the benefit of wife and children, or either, constitutes a fraudulent transfer of assets within the statute; and this, even though the debtor may have had no deliberate intention of depriving his creditors of a fund to which they were entitled, because his act has in point of fact withdrawn such a fund from them, and dealt with it by way of bounty. Freeman v. Pope, L. R. 9 Eq. 206, L. R.

[22] The statement of facts is much abbreviated and part of the opinion is omitted.

5 Ch. 538. The rule stands upon precisely the same ground as any other disposition of his property by the debtor. The defect of the disposition is that it removes the property of the debtor out of the reach of his creditors. Cornish v. Clark, L. R. 14 Eq. 189. But the rule applies only to that which the debtor could have made available for payment of his debts. * * *

A person has an insurable interest in his own life for the benefit of his estate. The contract affords no compensation to him, but to his representatives. So the creditor has an insurable interest in the debtor's life, and can protect himself accordingly, if he so chooses. Marine and fire insurance is considered as strictly an indemnity; but while this is not so as to life insurance, which is simply a contract, so far as the company is concerned, to pay a certain sum of money upon the occurrence of an event which is sure at some time to happen, in consideration of the payment of the premiums as stipulated, nevertheless the contract is also a contract of indemnity. If the creditor insures the life of his debtor, he is thereby indemnified against the loss of his debt by the death of the debtor before payment, yet if the creditor keeps up the premiums, and his debt is paid before the debtor's death, he may still recover upon the contract, which was valid when made, and which the insurance company is bound to pay according to its terms; but if the debtor obtains the insurance on the insurable interest of the creditor, and pays the premiums himself, and the debt is extinguished before the insurance falls in, then the proceeds would go to the estate of the debtor. Knox v. Turner, L. R. 9 Eq. 155. The wife and children have an insurable interest in the life of the husband and father, and if insurance thereon be taken out by him, and he pays the premiums and survives them, it might be reasonably claimed, in the absence of a statutory provision to the contrary, that the policy would inure to his estate. In Insurance Co. v. Palmer, 42 Conn. 60, 19 Am. Rep. 530, the wife insured the life of the husband, the amount insured to be payable to her if she survived him; if not, to her children. The wife and one son died prior to the husband, the son leaving a son surviving. The court held that, under the provisions of the statute of that state, the policy being made payable to the wife and children, the children immediately took such a vested interest in the policy that the grandson was entitled to his father's share, the wife having died before the husband; but that, in the absence of the statute, "it would have been a fund in the hands of his representatives for the benefit of the creditors, provided the premiums had been paid by him." So in the case of Anderson's Estate, 85 Pa. 202, A. insured his life in favor of his wife who died intestate in his lifetime, leaving an only child. A. died intestate and insolvent, the child surviving, and the court held that the proceeds of the policy belonged to the wife's estate, and, under the intestate laws, was

to be distributed share and share alike between her child and her husband's estate, notwithstanding, under a prior statute, life insurance taken out for the wife vested in her free from the claims of the husband's creditors. But if the wife had survived she would have taken the entire proceeds.

We think it cannot be doubted that in the instance of contracts of insurance with a wife or children, or both, upon their insurable interest in the life of the husband or father, the latter, while they are living, can exercise no power of disposition over the same without their consent, nor has he any interest therein of which he can avail himself, nor upon his death have his personal representatives or his creditors any interest in the proceeds of such contracts, which belong to the beneficiaries, to whom they are payable. It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries; and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. Bliss, Ins. (2d Ed.) 517; Glanz v. Gloeckler, 10 Ill. App. 486, per McAllister, J.; s. c., 104 Ill. 573, 44 Am. Rep. 94; Wilburn v. Wilburn, 83 Ind. 55; Ricker v. Insurance Co., 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289; Insurance Co. v. Brant, 47 Mo. 419, 4 Am. Rep. 328; Gould v. Emerson, 99 Mass. 154, 96 Am. Dec. 720; Insurance Co. v. Weitz, 99 Mass. 157.

This must ordinarily be so where the contract is directly with the beneficiary; in respect to policies running to the person insured, but payable to another having a direct pecuniary interest in the life insured; and where the proceeds are made to inure by positive statutory provisions. Mrs. Hume was confessedly a contracting party to the Maryland policy; and, as to the Connecticut contracts, the statute of the state where they were made and to be performed explicitly provided that a policy for the benefit of a married woman shall inure to her separate use or that of her children; but if the annual premium exceed $300, the amount of such excess shall inure to the benefit of the creditors of the person paying the premiums. The rights and benefits given by the laws of Connecticut in this regard are as much part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place. And if this be so as between Hume and the Connecticut companies, then he could not have at any time disposed of these policies without the consent of the beneficiary; nor is there anything to the contrary in the statutes or general public policy of the District of Columbia. It may very well be that a transfer by an insolvent of a Connecticut policy, payable to himself or his personal representatives, would

be held invalid in that district, even though valid under the laws of Connecticut, if the laws of the district were opposed to the latter, because the positive laws of the domicile and the forum must prevail; but there is no such conflict of laws in this case, in respect to the power of disposition by a person procuring insurance payable to another.

The obvious distinction between the transfer of a policy taken out by a person upon his insurable interest in his own life, and payable to himself or his legal representatives, and the obtaining of a policy by a person upon the insurable interest of his wife and children, and payable to them, has been repeatedly recognized by the courts.[23] * * *

Conceding, then, in the case in hand, that Hume paid the premiums out of his own money, when insolvent, yet, as Mrs. Hume and the children survived him, and the contracts covered their insurable interest, it is difficult to see upon what ground the creditors, or the administrators as representing them, can take away from these dependent ones that which was expressly secured to them in the event of the death of their natural supporter. The interest insured was neither the debtor's nor his creditors'. The contracts were not payable to the debtor, or his representatives, or his creditors. No fraud on the part of the wife, or the children, or the insurance company is pretended. In no sense was there any gift or transfer of the debtor's property, unless the amounts paid as premiums are to be held to constitute such gift or transfer. This seems to have been the view of the court below, for the decree awarded to the complainants the premiums paid to the Virginia Company from 1874 to 1881, inclusive, and to the other companies from the date of the respective policies; amounting, with interest, to January 4, 1883, to the sum of $2,696.10, which sum was directed to be paid to Hume's administrators out of the money which had been paid into court by the Maryland and Connecticut Mutual Companies. But, even though Hume paid this money out of his own funds when insolvent, and if such payment were within the statute of Elizabeth, this would not give the creditors any interest in the proceeds of the policies, which belonged to the beneficiaries for the reasons already stated.

Were the creditors, then, entitled to recover the premiums? These premiums were paid by Hume to the insurance companies, and to recover from them would require proof that the latter participated in the alleged fraudulent intent, which is not claimed. Cases might be imagined of the payment of large premiums, out

[23] Here the court quotes from Elliott's Appeal, 50 Pa. 75, 88 Am. Dec. 525 (1865), and McCutcheon's Appeal, 99 Pa. 137 (1881), and cites Bank v. Insurance Co. (C. C.) 24 Fed. 770 (1885), Pence v. Makepeace, 65 Ind. 347 (1879), Succession of Hearing, 26 La. Ann. 326 (1874), Stigler's Ex'r v. Stigler, 77 Va. 163 (1883), and Thompson v. Cundiff, 11 Bush (Ky.) 567 (1875).

of all reasonable proportion to the known or reputed financial condition of the person paying, and under circumstances of grave suspicion, which might justify the inference of fraud on creditors in the withdrawal of such an amount from the debtor's resources; but no element of that sort exists here. The premiums form no part of the proceeds of the policies, and cannot be deducted therefrom on that ground. Mrs. Hume is not shown to have known of or suspected her husband's insolvency, and if the payments were made at her instance, or with her knowledge and assent, or, if, without her knowledge, she afterwards ratified the act, and claimed the benefit, as she might rightfully do, (Thompson v. Insurance Co., 46 N. Y. 675,) and as she does, (and the same remarks apply to the children,) then has she thereby received money which ex æquo et bono she ought to return to her husband's creditors; and can the decree against her be sustained on that ground? If in some cases payments of premiums might be treated as gifts inhibited by the statute of Elizabeth, can they be so treated here?

It is assumed by complainants that the money paid was derived from Hume himself, and it is therefore argued that to that extent his means for payment of debts were impaired. That the payments contributed in any appreciable way to Hume's insolvency, is not contended. So far as premiums were paid in 1880 and 1881, (the payments prior to those years having been the annual sum of $196.18 on the Virginia policy,) we are satisfied from the evidence that Hume received from Mrs. Pickrell, his wife's mother, for the benefit of Mrs. Hume and her family, an amount of money largely in excess of these payments, after deducting what was returned to Mrs. Pickrell; and that, in paying the premiums upon procuring the policies in the Maryland and the Connecticut Mutual, Hume was appropriating to that purpose a part of the money which he considered he thus held in trust; and we think that, as between Hume's creditors and Mrs. Hume, the money placed in Hume's hands for his wife's benefit is, under the evidence, equitably as much to be accounted for to her by Hume, and so by them, as is the money paid on her account to be accounted for by her to him or them. We do not, however, dwell particularly upon this, nor pause to discuss the bearing of the laws of the states of the insurance companies upon this matter of the payment of premiums by the debtor himself, so far as they may differ from the rule which may prevail in the District of Columbia, in the absence of specific statutory enactment upon that subject, because we prefer to place our decision upon broader grounds.

In all purely voluntary conveyances it is the fraudulent intent of the donor which vitiates. If actually insolvent, he is held to knowledge of his condition; and if the necessary consequence of his act is to hinder, delay, or defraud his creditors, within the statute, the presumption of the fraudulent intent is irrebuttable and

conclusive, and inquiry into his motives is inadmissible. But the circumstances of each particular case should be considered, as in Partridge v. Gopp, 1 Eden, 163, Amb. 596, where the Lord Keeper, while holding that debts must be paid before gifts are made, and debtors must be just before they are generous, admitted that "the fraudulent intent might be collected from the magnitude and value of the gift." Where fraud is to be imputed, or the imputation of fraud repelled, by an examination into the circumstances under which a gift is made to those towards whom the donor is under natural obligation, the test is said, in Kipp v. Hanna, 2 Bland (Md.) 33, to be the pecuniary ability of the donor at that time to withdraw the amount of the donation from his estate without the least hazard to his creditors, or in any material degree lessening their then prospects of payment; and, in considering the sufficiency of the debtor's property for the payment of debts, the probable, immediate, unavoidable, and reasonable demands for the support of the family of the donor should be taken into the account and deducted, having in mind also the nature of his business and his necessary expenses. Emerson v. Bemis, 69 Ill. 541. This argument in the interest of creditors concedes that the debtor may rightfully preserve his family from suffering and want. It seems to us that the same public policy which justifies this, and recognizes the support of wife and children as a positive obligation in law as well as morals, should be extended to protect them from destitution after the debtor's death, by permitting him, not to accumulate a fund as a permanent provision, but to devote a moderate portion of his earnings to keep on foot a security for support already, or which could thereby be, lawfully obtained, at least to the extent of requiring that, under such circumstances, the fraudulent intent of both parties to the transaction should be made out. And inasmuch as there is no evidence from which such intent on the part of Mrs. Hume or the insurance companies could be inferred, in our judgment none of these premiums can be recovered.

The decree is affirmed, except so far as it directs the payment to the administrators of the premiums in question and interest, and, as to that, is reversed, and the cause remanded to the court below, with directions to proceed in conformity with this opinion. Ordered accordingly.[24]

[24] The rule of the principal case that the proceeds of a life insurance policy taken out by an insolvent debtor for his wife's benefit, and the amount paid in premiums thereon, are exempt from the claim of creditors, is followed in Masonic Mutual Life Ass'n v. Paisley (C. C.) 111 Fed. 34 (1901); Hendrie & Bolthoff Mfg. Co. v. Platt, 13 Colo. App. 15, 56 Pac. 211 (1899); State v. Tomlinson, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. Rep. 335 (1897); Johnson v. Alexander, 125 Ind. 575, 25 N. E. 706, 9 L. R. A. 660 (1890). It has been repudiated in Merchants' & Miners' Transportation Co. v. Borland, 53 N. J. Eq. 282, 31 Atl. 272 (1895); Lehman v. Gunn, 124 Ala. 213, 27 South. 475, 51 L. R. A. 112, 82 Am. St. Rep. 159 (1900); Fearn v. Ward, 80 Ala. 555, 2 South. 114 (1887); Pullis v. Robison, 73 Mo. 201, 39 Am. Rep. 497

In re POLICY NO. 6402 OF SCOTTISH EQUITABLE LIFE ASSUR. SOCIETY.

(Supreme Court of Judicature, Chancery Division. [1902] 1 Ch. 282.)

See ante, p. 167, for a report of the case.

INDIANA NAT. LIFE INS. CO. v. McGINNIS.

(Supreme Court of Indiana, 1913. 101 N. E. 289, 45 L. R. A. [N. S.] 192.)

Action by Melissa McGinnis against the Indiana National Life Insurance Company. From a judgment for plaintiff, defendant appealed to the Appellate Court (99 N. E. 751).

SPENCER, J. This suit was brought in June, 1909, to recover upon a life insurance contract issued on December 9, 1907, to John R. McGinnis, and payable $3,000 to appellee, the mother of the insured, and $2,000 to Emily S. McGinnis, the wife of the insured. John R. McGinnis died in Colorado on January 16, 1909. The contract or policy in suit contained, among others, the following provisions: "Incontestability. After one year from date of issue this policy shall be incontestable if the premiums have been duly paid." "The insured may at any time during the continuance of this policy, provided the policy is not then assigned, and subject to the rules of this company regarding assignments and beneficiaries, change the beneficiary or beneficiaries by written notice to the company, at its head office; such change to take effect on the indorsement of the same on the policy by the company." In answer to appellee's complaint seeking to recover on this policy, the appellant set up an affirmative defense in seven paragraphs, to the first, third, fourth, and sixth of which demurrers were sustained.

[The answer of the defendant alleged in substance certain false and fraudulent misstatements as to health and habits made by the insured, which, by the terms of the policy, constituted breaches of warranties avoiding the contract; that upon learning of the fraud practiced by the insured, the defendant had within one year from the issue of the policy repaid to him the amount of the first premium, and upon cancellation of the policy had obtained from the insured a written release from all claims under such policy; and that the second annual

(1880); Stigler's Ex'x v. Stigler, 77 Va. 163 (1883); Stokes v. Coffey, 8 Bush (Ky.) 533 (1871); Pence v. Makepeace, 65 Ind. 345 (1879).

The right of an insolvent debtor to take out insurance upon his life and pay the premiums out of his assets to the detriment of his creditors is now quite generally fixed by statute. See Northwestern Mut. Life Ins. Co. v. Chehalis County Bank, 65 Wash. 374, 118 Pac. 326 (1911); Kittel v. Domeyer, 175 N. Y. 205, 67 N. E. 433 (1903); York v. Flaherty, 210 Mass. 35, 96 N. E. 53 (1911); Levy's Adm'r v. Globe Bank & Trust Co., 143 Ky. 690, 137 S. W. 215 (1911).

For a sharp criticism of Central Nat. Bank v. Hume, see the article by Professor Williston in 25 Am. Law Rev. 185.

premium had not been paid. The plaintiff's reply alleged that on December 9, 1907, a check for the amount of the premium then due was tendered, but refused by the defendant on the ground that the policy had been canceled.] [25]

The most difficult questions here presented are resolvable into the following: (1) Does the incontestable clause preclude the company from asserting as a defense to its liability the charge of false and fraudulent answers of the insured, the warranties in the contract, the mutual cancellation of the policy by the insurer and the insured without the knowledge of the beneficiary for a cash consideration paid by the company to the insured, where the answer asserting such defense is filed more than one year after the execution, delivery, and acceptance of the contract? (2) Had the beneficiary upon the execution, delivery, and acceptance of this policy, such an interest therein, either vested, absolute, defeasible, indefeasible, qualified, limited, or otherwise, that her interest cannot be taken from her without her knowledge or consent by an agreement canceling the policy, made between the insurer and the insured, to which she is not a party. * * * In other words, where the terms of the contract specifically provide for the change of beneficiary by compliance with certain conditions, can the appellee's interest in the policy, whatever it may be termed, be lost to her by an agreement to cancel made by the insurer and the insured, to which agreement she is in no sense a party?

We shall endeavor to consider these questions in the order stated. The record discloses that this action was commenced on June 16, 1909, more than one year and six months after the execution of the policy. It seems to be a well-recognized principle of insurance law that a provision in a contract of insurance limiting the time in which the insurer may take advantage of certain facts that might otherwise constitute a good defense to its liability on such contract is valid, and precludes every defense to the policy other than the defenses excepted in the provision itself. It also seems to be generally held that such a clause precludes the defense of fraud, as well as other defenses, and that it is not invalid on the theory that it is against public policy, provided the time in which the defenses must be made is not unreasonably short. An examination of the following cases will show that the holding of the courts of this country has been almost universally that every defense to a policy of insurance embraced within the terms of the "incontestable clause" is completely lost to the insurer, if it fails to make the defense or take affirmative action within the time limited by the policy. Kline v. National Benefit Ass'n, 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703; Federal Life Ins. Co. v. Kerr, 173 Ind. 613, 89 N. E. 398, 91 N. E. 230; Court of Honor v. Hutchens, 43 Ind. App. 321, 82 N. E. 89; People's Mut. Ben. Soc. v. Templeton, 16 Ind. App. 126, 44

[25] In the omitted portion of the opinion the court states the pleadings and decides that the defense of nonpayment of the second annual premium was not available to the defendant because of the tender refused.

N. E. 809; Wright v. Mutual Ben. Ass'n, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749; Clement v. N. Y. Ins. Co., 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650; Reagan v. Union Mut. Life Ins. Co., 189 Mass. 555, 76 N. E. 217, 2 L. R. A. (N. S.) 821, 109 Am. St. Rep. 659, 4 Ann. Cas. 362; Goodwin v. Provident Assur. Ass'n, 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411; Murray v. State Ins. Co., 22 R. I. 524, 48 Atl. 800, 53 L. R. A. 742; Royal Circle v. Achterrath, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. Rep. 224; Mutual, etc., Ass'n v. Austin, 142 Fed. 398, 73 C. C. A. 498, 6 L. R. A. (N. S.) 1064; Massachusetts Ben. L. Ass'n v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; Northwestern Mut. L. Ins. Co. v. Montgomery, 116 Ga. 799, 43 S. E. 79; New York Life Ins. Co. v. Baker, 83 Fed. 647, 27 C. C. A. 658; Kansas Mut. Life Ins. Co. v. Whitehead, 123 Ky. 21, 93 S. W. 609, 13 Ann. Cas. 301; Williams v. St. Louis Life Ins. Co., 189 Mo. 70, 87 S. W. 499; Teeter v. United, etc., Ins. Ass'n, 159 N. Y. 411, 54 N. E. 72; Thompson v. Fidelity Mut. Life Ins. Co., 116 Tenn. 557, 92 S. W. 1098, 6 L. R. A. (N. S.) 1039, 115 Am. St. Rep. 823; Patterson v. Natural Premium M. L. Ins. Co., 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899.

We note that with great earnestness the appellant contends that "false and fraudulent representations of an applicant for life insurance, which are made warranties, will defeat recovery," but it must not be overlooked that there is no charge of fraud against the appellee herein, except through that part of the application in which it is provided that the insured for "any person claiming any interest in the policy" warranted all of his statements and answers to be true, and also that the effort to plead this is made after the limitation provided in the contract, which limitation was certainly an inducement held out by the company to augment the sale of its contract. The incontestable clause is construed by us to be binding upon the appellant, and to mean just what it says, that, "after one year from the date of issue, this policy shall be incontestable if the premiums have been duly paid."

The next question for consideration is: What, if any, interest did appellee, as beneficiary, take or have in this policy at the time of its issuance, delivery, and acceptance, and, if she had any interest therein, how was it disposed of? At the threshold of this branch of the case, we feel that, as here presented, this is a new question in this jurisdiction, and in so saying we are not unmindful of the many cases so ably presented by the appellant on this issue, but we cannot concur in the expression: "The law, as it has been declared, will have to be changed, and the authorities overruled before any other conclusion can be reached." And we might here say that we quite agree with appellant in its expression that "the abandonment and rescission of a contract of life insurance by mutual agreement between the insurer and the insured puts an end to the contract"—that is, so far as the insurer and the insured are concerned—but what about a third person

for whose benefit the contract by its express terms was made, and who is not only not a party to the agreement of abandonment and rescission, but who has no knowledge of it?[26] * * *

In most of the jurisdictions of this country, except Wisconsin, the authorities seem to be uniform that in an ordinary life insurance policy made payable to a beneficiary and which does not authorize a change of beneficiary the named beneficiary has an absolute, vested interest in the policy from the date of its issuance, delivery, and acceptance. Kline v. National Ben. Ass'n, 111 Ind. 462–465, 11 N. E. 620, 60 Am. Rep. 703; Damron v. Penn Mutual Life Ins. Co., 99 Ind. 478; Wilburn v. Wilburn, 83 Ind. 55; Masons' Union Life Ass'n v. Brockman, 20 Ind. App. 206–214, 50 N. E. 493; Franklin Life Ins. Co. v. Galligan, 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73; Lanier v. Eastern Life Ins. Co., 142 N. C. 14, 54 S. E. 786; Preston v. Connecticut Mutual Life Ins. Co., 95 Md. 101, 51 Atl. 838; Lockwood v. Michigan Mut. Life Ins. Co., 108 Mich. 334, 66 N. W. 229. And, where a policy or contract of life insurance contains the right of the insured to change the beneficiary, such right must be exercised specifically in the manner provided in such policy or contract. Farra v. Braman, 171 Ind. 529–542, 86 N. E. 843; Mason v. Mason, 160 Ind. 191–196, 65 N. E. 585; Holland v. Taylor, 111 Ind. 121, 12 N. E. 116; Smith v. Nat. Benefit Soc., 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616; Arnold v. Empire Life Ins. Co., 3 Ga. App. 685, 60 S. E. 470; 2 May on Insurance, § 399 E; Bliss on Life Insurance (2d Ed.) §§ 318, 337.

While we understand that the appellant insists that in such a policy or contract (where the insured has the right to change the beneficiary) the beneficiary does not have a vested or indefeasible interest, but that the interest of the beneficiary is conditional and subject to the exercise of such right by the insured, or is subservient to the conditions and limitations reserved by the insured, we do not understand appellant as claiming or insisting that the beneficiary in such policy has absolutely no interest. It seems, as we view it, that in such a policy or contract the beneficiary has some interest, and that the insured has reserved to himself a power with the right of exercise to the extent of defeating or cutting off the interest of the beneficiary by a strict compliance with the terms of such power as in the contract or policy written; that the interest therein taken and owned by the beneficiary upon the issuance, delivery, and acceptance of the policy was a defeasible, vested interest.

In the case of Farra v. Braman, supra, on page 540 of 171 Ind., on page 847 of 86 N. E., the court in quoting from Holland v. Taylor,

[26] The court here distinguishes the following cases cited by defendant in support of its contention: Equitable Life Ins. Co. v. Stough, 45 Ind. App. 411, 89 N. E. 612 (1909); Eagle v. New York Life Ins. Co., 48 Ind. App. 284, 91 N. E. 814 (1910); Hopkins v. Northwestern Life Assurance Co., 99 Fed. 199, 40 C. C. A. 1 (1900).

supra, referring to the relation of the beneficiary to the contract, said: "It would be saying too much to say that she had no right. * * * So long as the contract remained as executed, she had the right of a beneficiary, subject to be defeated by change of beneficiary by the insured. So long as it remained as executed, the assured *had reserved to himself the power* to change the beneficiary and that was the extent of his *right* in, or *power* over, the certificate or the *amount agreed to be paid at his death.*" (Italics ours.) Again on page 541 of 171 Ind., on page 848 of 86 N. E., the same court, referring to the case of Mason v. Mason, supra: "There are cases * * * in which the principles of equity may be invoked to aid a defective *exercise of power* by the insured in making a change in the beneficiary;" and again, in referring to the case then under consideration: "In the case at bar there is no room for invoking the aid of equity, as there is no element of fraud therein, and there is no defective exercise by the assured of the *power or right* to change the original beneficiary." (Italics ours.) As to the beneficiary having an interest and that the right reserved by the insured to change the beneficiary is the right to exercise a power, see Isgrigg, Ex'r, v. Schooley, 125 Ind. 94, 25 N. E. 151. In the case of Holder v. Prudential Insurance Co., 77 S. C. 299, 57 S. E. 853, the court held that the rights of the beneficiaries became vested as soon as the insured and the insurer entered into the contract, and, although the policy reserved to the insured the right to change the beneficiary, the insured had no right to surrender the policy for the purposes of cancellation.

In the case of Washington Life Ins. Co. v. Berwald, 97 Tex. 111, 76 S. W. 442, 1 Ann. Cas. 682, the court uses this language: "The wife has an insurable interest in her husband's life, which she may insure, taking a policy payable to herself or to her children; therefore, it cannot be said that the insurance procured by the husband for the wife is a mere gratuity. It is to protect an existing interest, as well as the performance of the duty to the wife. It is a contract about a matter of interest to the wife, and she can pay the premiums herself in case her husband fails to do so. * * * If she has such an interest in the contract that she might protect it against the wishes of her husband and the insurance company by making payments according to the terms of the contract, she is not a stranger to it, and surely her interest is of a character that she cannot be deprived of it without her consent, except by her failure to see that the terms of the contract are complied with." In the case of Freund v. Freund, 218 Ill. 189, at page 201, 75 N. E. 925, at page 929, 109 Am. St. Rep. 283, the Supreme Court of that state, quoting Thomas v. Thomas, 131 N. Y. 205, 30 N. E. 61, 27 Am. St. Rep. 582, and other New York cases, says: "In the present case * * * the right of the assured to change the beneficiary is a qualified right; that is, subject to the consent of the company and to the indorsement upon the policy by the company at its home office. The tendency of the decisions when carefully examined is to sustain the rule that a change of beneficiary cannot be accomplish-

ed except by compliance with the provisions * * * in the contract for such change."

In the case of Arnold v. Empire Mut. Annuity & Life Ins. Co., 3 Ga. App. 695, 60 S. E. 470, the court says: "The beneficiary of an insurance policy has a vested right in the contract of insurance, which cannot be diminished or affected by subsequent agreements between the insurer and the insured, which are not stipulated or provided for in the original contract. The vested right of the beneficiary is subject to be divested only in accordance with express provisions of the contract permitting a change of beneficiary." And, after reviewing and citing a great number of authorities, the court concluded the question by asserting that "the true rule would seem to be that laid down by May on Insurance, § 3990, and that, 'if there is express provision for a change, * * * a new designation may be made in the mode prescribed, but courts lean to upholding a designation, if clear, though defective in form.' Those courts which hold that the interest of the beneficiary, during the life of the insured, is merely an expectancy, when the insured has the right to change the beneficiary, hold nevertheless that the change must be made in strict conformity with the provisions of the policy upon that subject in order to divest the interest of the beneficiary named therein. We have heretofore alluded to the fact that the policy in this case provided for a change of beneficiary, but that the right of the plaintiff in error was not divested by any attempt to comply with this condition of the contract. That the beneficiary of a contract of life insurance has a vested right in the contract (though it may be divested by the selection under the special provision of the contract of a new beneficiary) admits of no question." Smith v. Head, 75 Ga. 757.

In Townsend v. Townsend, 127 Ky. 230, 105 S. W. 937, 16 L. R. A. (N. S.) 316, the court said: "The only reservation to the insured was the right to surrender the policy at the end of the first ten years, or at the end of any subsequent five years, and to receive in cash its then surrender value, and this right continued only for thirty days immediately following the ten and five year terms mentioned. Unless, then, this right was exercised at the time and in the manner expressed in the policy, the interest of the named beneficiaries continued unaffected by it. Their interest was vested, subject to be defeated only (1) if they died before the insured; and (2) if he, at the time and in the manner expressed in the policy, exercised his option to surrender it in exchange for its then cash surrender value. It was not within the power of the insured, or *within his* and *the insurer's power,* to alter the terms of the contract so as to affect the interests of the beneficiaries. The insured had not the right to assign the policy to another, for value or not, nor had he the right to pledge it as collateral to secure his own indebtedness." (Italics ours.)

The contract of insurance in this case was delivered and accepted on December 9, 1907, was in the possession of the appellee, the bene-

ficiary, and was not surrendered to the company. On November 30, 1908, the appellant paid to the insured $140.45 in consideration of the execution of a release. Appellee was not a party to such release, and acquired no knowledge of it until December 8, 1908, when appellant returned the check of the agent of the insured and appellee, and notified appellee that such contract had been canceled and requested the surrender of the policy. It seems to us that a pertinent inquiry here would be, Who had the title to the policy on November 30, 1908? Certainly some sort of a title thereto was in the appellee, and, whatever that title was, she could be divested of it only by a strict compliance with the conditions of the contract as therein provided, or by some act or proceeding to which appellee was a party so that she would be bound thereby. From the foregoing we conclude that the attempt to cancel the policy and terminate the liability of the appellant to this beneficiary was not in accord with the specific terms of the contract; that a change of beneficiary as provided therein contemplated the continuance of the contract and did not contemplate the complete annulment and determination thereof; that the beneficiary upon the issuance, delivery, and acceptance of the policy of insurance took such a defeasible vested interest therein as under this contract was not to be divested by the agreement between the insurer and the insured canceling the policy; and that the trial court did not err, therefore, in sustaining demurrers to the first, third, fourth, and sixth paragraphs of appellant's answer to appellee's complaint.

The judgment of the Marion superior court is therefore affirmed.[27]

[27] See, in accord, Johnson v. New York Life Ins. Co. (Colo.) 138 Pac. 414 (1913); Arnold v. Empire Life Ins. Co., 3 Ga. App. 685, 60 S. E. 470 (1908); Holder v. Prudential Ins. Co., 77 S. C. 299, 57 S. E. 853 (1907). See especially the interesting case of Lanier v. Insurance Co., 142 N. C. 15, 54 S. E. 786 (1906), in which it was held that at the suit of a beneficiary on a life policy the insurer, setting up a change of beneficiary under a term of the policy allowing it, has the burden of proving that such change has been made in compliance with the terms of the policy.

The contrary doctrine, that the beneficiary of a policy providing for a change of the beneficiary by the insured has only an expectancy, and not a vested interest, is well expressed by Gray, Circuit Judge, in Hopkins v. Northwestern Life Assurance Co., 99 Fed. 199, 40 C. C. A. 1 (1900), as follows: "The control over the contract of insurance given to the insured, independent of the will of the beneficiary, makes impossible the existence of such permanent or vested interest in such beneficiary during the lifetime of the insured. The right of the beneficiary is inchoate, and a mere expectancy, during such lifetime, and does not become vested until the death of the insured happens with the policy unchanged." See, in accord, Atlantic Mutual Life Ins. Co. v. Gannon, 179 Mass. 291, 60 N. E. 933 (1901).

Similar to the clause allowing a change of beneficiary, in their effect upon the interest of the beneficiary, are the provisions permitting a surrender of the policy for its cash value by the insured, and conditions requiring that in order to receive the amount of the policy the beneficiary must survive the insured. As holding that in such cases the interest of the beneficiary is vested, though subject to be divested in the manner specified in the policy, see Townsend's Assignee v. Townsend, 127 Ky. 230, 105 S. W. 937, 16 L. R. A. (N. S.) 316 (1907); Wallace v. Mutual Benefit Life Ins. Co., 97 Minn. 27, 106 N. W. 84, 3 L. R. A. (N. S.) 478 (1906). In United States Casualty

SUPREME CONCLAVE, ROYAL ADELPHIA, v. CAPPELLA et al.

(Circuit Court of the United States, E. D. Michigan, 1890. 41 Fed. 1.)

This was a bill of interpleader to settle the title to a certain benefit certificate. The certificate in question, which was for the sum of $3,000, was originally issued October 17, 1885, to Leo F. Kratzsch, and made payable to his sister Emma, in accordance with the laws of the order, one of which provided as follows: "A member may at any time, when in good standing, surrender his benefit certificate, and a new one shall be issued, payable to such beneficiary or beneficiaries as such member may direct, in compliance with the laws and usages of the order, and the payment of a fee of fifty cents. Said surrender and direction must be made in writing, signed by the member, and forwarded under the seal of the subordinate conclave, with the benefit certificate, to the supreme secretary." This certificate was duly transferred by the insured to Miss Cappella, his aunt, one of the defendants in the action, who had loaned him $400 and cared for him during illness. Later Leo Kratzsch, desiring to change the certificate so that his father, the other defendant in the action, should receive $2,000, and Miss Cappella $1,000, directed the latter to send the policy to the supreme secretary and have the beneficiaries changed accordingly. Miss Cappella, however, did not do as requested, but, retaining the policy, wrote the insured that it was best to leave matters as they were.

On the 14th of September, Leo, being then very near his end, signed and duly executed and acknowledged an instrument in writing, directed to the supreme secretary of the plaintiff, requesting plaintiff to change his certificate in accordance with his original agreement with Miss Cappella, and stating that he could not make an actual surrender of the certificate then in force, because the same was in possession of the defendant Cappella. This instrument was duly attested by the secretary of Carpenter Conclave, No. 17, sealed with the seal of the conclave, and on the 18th of September delivered to and received by the supreme secretary of the plaintiff, together with the fee of fifty cents required by the rules of the order. On the 19th

Co. v. Kacer, 169 Mo. 301, 69 S. W. 370, 58 L. R. A. 436, 92 Am. St. Rep. 641 (1902), the policy was made payable to the daughters of the insured "if surviving." The insured and his daughter perished in a common disaster. It was held that, in the absence of proof that the daughter did not survive, her representatives, and not those of the father, were entitled to the insurance money, inasmuch as the right of the daughter was not contingent, but vested, subject to be divested.

In Supreme Council Royal Arcanum v. Kacer, 96 Mo. App. 93, 69 S. W. 671 (1902), upon the same state of facts, the same controversy arose between the representatives of the insured and of the beneficiary in respect to the proceeds of a certificate in a mutual benefit association. It was held that the burden was on the beneficiary's representatives to prove her survivorship, since in mutual benefit insurance the beneficiary has no vested rights.

of September the insured died at the residence of his father. Due proof having been made of his death, the plaintiff audited the claim upon which it became liable, by reason of his death, at the sum of $2,910, being the amount of the certificate, less the sum of $90 paid prior to his death. Suits having been begun by Miss Cappella in this court, and by the defendant Julius Kratzsch in the State court at Milwaukee, plaintiff filed this bill of interpleader to compel defendants to litigate their respective claims upon the fund, and paid into court the amount of the certificate as audited.[28]

BROWN, J. This is one of a class of cases which have become quite common within the past twenty-five years, arising out of an inexpensive method of insurance, by which persons in moderate circumstances may, by the payment of a small monthly assessment, secure a provision for themselves or their families in case of sickness, accident, or death. Much of the law applicable to ordinary cases of life insurance is equally applicable here. In a few particulars, however, it seems to be somewhat less favorable to the person for whose benefit the policy is taken out. For instance, in case of an ordinary policy, the right of a person for whose benefit the policy is issued cannot be defeated by the separate and joint acts of the assured and the company, without the consent of the beneficiary, Bliss, Ins., § 318; while it is entirely well settled that in cases of this description the beneficiary has no vested interest in the benefit certificate until the death of the insured member. Up to this time he may change his designation of beneficiary at will, against the consent of such beneficiary, even though the latter may have advanced the money to pay the assessments upon the certificate. Bac. Ben. Soc. § 306; Lamont v. Association (C. C.) 30 Fed. 817; Wendt v. Legion of Honor, 72 Iowa, 682, 34 N. W. 470; Association v. Montgomery, 70 Mich. 587, 38 N. W. 588, 14 Am. St. Rep. 519; Fisk v. Union, 11 Atl. 84; Hellenberg v. District No. 1, 94 N. Y. 580; Society v. Burkhart, 110 Ind. 192, 10 N. E. 79, 11 N. E. 449; Holland v. Taylor, 111 Ind. 121, 12 N. E. 116; Lamont v. Grand Lodge (C. C.) 31 Fed. 177; Schillinger v. Boes, 85 Ky. 357, 3 S. W. 427; Knights of Honor v. Watson, 64 N. H. 517, 15 Atl. 125; Beatty's Appeal, 122 Pa. 428, 15 Atl. 861; Byrne v. Casey, 70 Tex. 247, 8 S. W. 38.

In making such change of beneficiary, however, the insured is bound to do it in the manner pointed out by the policy and the by-laws of the association, and any material deviation from this course will invalidate the transfer.[29] Thus, if the certificate provides that no assignment shall be valid unless approved by the secretary, an

[28] The statement of facts has been condensed.

[29] See Berg v. Damkoehler, 112 Wis. 587, 88 N. W. 606 (1902); Provident Life Assurance Co. of New York v. Dees, 120 Ky. 285, 86 S. W. 522 (1905); Canavan v. John Hancock Mutual Life Ins. Co., 39 Misc. Rep. 782, 81 N. Y. Supp. 304 (1902); Freund v. Freund, 218 Ill. 189, 75 N. E. 925, 109 Am. St. Rep. 283 (1905), applying the same rule to regular life insurance contracts.

assignment without such approval will be invalid. Harman v. Lewis (C. C.) 24 Fed. 97, s. c., 530. So, if it be provided that such change must be made on a prescribed form or blank, the signature to which shall be attested before a notary, and the change entered upon the books, an assignment to a creditor as collateral security, not made upon the prescribed blank, and of which the association had no notice until after the death of the member, was held to be fatally defective. Association v. Brown (C. C.) 33 Fed. 11. So, where the certificate required every surrender to be in writing, attested by the reporter under the lodge seal, it was held that a conditional surrender of the same by the holder, not to take effect until after his death, and not made in the presence of or attested by such lodge reporter, was invalid. Supreme Lodge v. Nairn, 60 Mich. 44, 26 N. W. 826. See, also, Wendt v. Legion of Honor, 72 Iowa, 682, 34 N. W. 470; Elliott v. Whedbee, 94 N. C. 115; Mellows v. Mellows, 61 N. H. 137; Highland v. Highland, 109 Ill. 366. So, if the by-laws fix definitely the manner of changing the beneficiary by his action during his life, an attempt to divert the benefit by will has usually been held to be abortive. Holland v. Taylor, 111 Ind. 121, 12 N. E. 116; Stephenson v. Stephenson, 64 Iowa, 534, 21 N. W. 19; Insurance Co. v. Miller, 13 Bush (Ky.) 489; Vollman's Appeal, 92 Pa. 50; Renk v. Herrman Lodge, 2 Dem. Sur. (N. Y.) 409; Daniels v. Pratt, 143 Mass. 216, 10 N. E. 166.

There are, however, three exceptions to this general rule requiring an exact conformity with the regulations of the association:

(1) If the society has waived a strict compliance with its own rules, and, in pursuance of the request of the insured to change his beneficiary, has issued a new certificate to him, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued. This naturally follows from the fact that, having no vested interest in the certificate during the lifetime of the assured, he has no right to require that the rules of the association, which are framed alone for its own protection and guidance, are not complied with. Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; Splawn v. Chew, 60 Tex. 532; Manning v. Ancient Order, 86 Ky. 136, 5 S. W. 385, 9 Am. St. Rep. 270; Society v. Lupold, 101 Pa. 111; Brown v. Mansur, 64 N. H. 39, 5 Atl. 768; Knights of Honor v. Watson, 64 N. H. 517, 15 Atl. 125; Byrne v. Casey, 70 Tex. 247, 8 S. W. 38; Titsworth v. Titsworth, 40 Kan. 571, 20 Pac. 213.[30] The case of Wendt v. Legion of Honor, 72 Iowa, 682, 34 N. W. 470, appears upon its face to lay down a different rule, but upon examination it will be seen that the change was attempted to be made by a paper which the insured called his last will, but which was no will in law;

[30] The same rule has been held applicable to defective changes of beneficiary in old line policies. See Daugherty v. Daugherty, 152 Ky. 732, 154 S. W. 9 (1913); John Hancock Mutual Life Ins. Co. v. White, 20 R. I. 457, 40 Atl. 5 (1898).

and the court held that, the interest of the beneficiary having become vested by the death of the insured, they had acquired rights which could not be cut off, except in the manner prescribed in the contract. This case, evidently, has no application to a change made prior to the death of the insured.

(2) If it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made. Thus, in the case of Grand Lodge v. Child, 70 Mich. 163, 38 N. W. 1, the insured made his betrothed the beneficiary, and subsequently lost his certificate. His beneficiary having married another, he made a statement of the loss, and applied for a reissue of the certificate, making his son the beneficiary. His application was refused. The rules of the organization required the change to be indorsed on the original certificate, but, by the advice of the officers, he attempted to make the change of beneficiary by giving a power of attorney to another to collect the amount which should accrue under the certificate. It was held that such acts constituted an equitable change of beneficiary, and that the son was entitled to the fund. The court held that the insured had done all that he could, and all that he was required in equity to do, to change the donee of the certificate. "The rules of the order allowed him to do this, and it was not in the discretion of the order to prevent it. * * * The law never requires impossibilities; and the rules of the order, which required the certificate to be surrendered when a change of the beneficiary was made, that it might be indorsed upon the certificate, could only be construed as requiring that to be done when the certificate was in existence. The existence of the right to share in the benefits of the order, and to direct who should receive the fund in case of the death of a member, was a right vested in the member as soon as he became entitled thereto, and the certificate was only evidence of the existence of that right, and, when that evidence was lost, the right remained, and its existence could be established by any other competent evidence; and the same is true of the existence of the change directed by the member of the beneficiary."

(3) If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but, before the new certificate is actually issued, he dies, a court of equity will decree that to be done which ought to be done, and act as though the certificate had been issued.[31] The case of Association v. Kirgin, 28 Mo. App. 80, is an illustration of this exception. In this case the insured, having met with a fatal accident, called

[31] See Mutual Life Ins. Co. v. Lowther, 22 Colo. App. 622, 126 Pac. 882 (1912); Daugherty v. Daugherty, 152 Ky. 732, 154 S. W. 9 (1913), where the same result was reached in actions at law on regular life insurance policies. See, contra, Freund v. Freund, 218 Ill. 189, 75 N. E. 925, 109 Am. St. Rep. 283 (1905), holding that the rights of the beneficiary became fixed at the death of the insured and are unaffected by an incompleted change of beneficiaries.

a friend, and requested him to take his certificate to the association and surrender it, pay the fee of fifty cents, and request them to issue a new one, payable to his wife. This was done, and a minute of the transaction was made on the records of the association for that day. On the following day the insured died. It was held that in doing this he had done all that the laws of the order required to be done on his part in order to have a new certificate; that his right to make the change was absolute, and that the association had no right to refuse his request; and, further, that the fact that the certificate was issued after his death was immaterial, since the certificate was not the right itself, but merely the evidence of the right. See, to the same effect, Mayer v. Association, 49 Hun, 336, 2 N. Y. Supp. 79; Supreme Lodge v. Nairn, 60 Mich. 44, 26 N. W. 826; Kepler v. Supreme Lodge, 45 Hun, 274. The case of Ireland v. Ireland, 42 Hun, 212, is distinguishable from these in the fact that the insured made no written request for a change, as required by the rules, but merely delivered the certificate to a friend, telling him he wanted it changed. This was manifestly insufficient.

We think the case under consideration falls within these exceptions. Five days before the death of the insured, he signed and acknowledged before a notary a written application for a change in his certificate in the form prescribed by the by-laws, stating that the original certificate to Anna Cappella was in her possession, and beyond his control. This application was delivered to the secretary of the Carpenter Conclave at Milwaukee, who affixed the seal of the conclave, and forwarded it to the supreme secretary. It is true, he did not surrender the original certificate, as required by the regulations; but he had done all in this connection which was within his power, or which he could reasonably be required to do. He had requested defendant Cappella to obtain it of Mueller, and deliver it to the proper officer at Milwaukee, and had taken her word that she would do so. She probably went to Milwaukee with that intention, but upon calling upon Mr. Eckstein, the collector of the Carpenter Conclave, she says he advised her that it would take four or five weeks to make a change, and she had better not do it. This was before she had obtained the certificate of Mueller.

It is but just to Mr. Eckstein to say that he gives an entirely different version of the transaction, and swears that she told him that she had been prevailed upon to make the change in the benefit certificate which was entirely satisfactory to her, saying that $1,000 was all she cared for, seeing that that was the amount the insured was owing her. Says he: "I asked her whether she had something written to that effect; that it should be made in that manner, or indorsed on the certificate. She said that nothing had been indorsed on the certificate, but she was perfectly willing to leave it as it was, and to give the father bonds or some security for the $2,000."

Upon arriving at St. Louis, she writes Leo that she thinks it best

to leave it the way it is, and that she will never cheat his father out of the money. Her purpose was illy concealed by this letter. Upon the stand she explains this by saying that Leo was being annoyed by his father about the certificate, and she wished to put his mind at rest, that he might die in peace, and that his father might understand that he was to have the benefit of two-thirds of the certificate. In short, she leaves us to infer that she never really intended to make the change. Our impression, however, is that she did intend, at first, to comply with Leo's request, but was overpersuaded by some one to change her mind. With regard to the writing which she received from Leo, she first says that it was destroyed, and then that it was lost; but, whichever it was, it is clear that the certificate was as much lost to the insured as if it had been destroyed.

While the supreme secretary may have been justified in refusing to issue a new certificate without a surrender of the old one, according to the requirements of the order, it certainly does not lie in the mouth of Miss Cappella to set up this failure in a court of equity, when she herself is a cause of it, and the company has admitted its liability by the payment of the money into court. No maxim of the law is founded upon more substantial justice than that which declares that no one shall take advantage of his own wrong. Under the by-laws of the company, the insured had a legal right to change his beneficiary whenever he pleased; and the consent of the company does not seem to be required, much less that of the beneficiary. Were the non-surrender of the certificate set up by the company in a common-law action brought by Kratzsch, it is possible that the court might be compelled to hold that he had failed to establish his title; but when the company waives this defense, or at least disclaims any interest in the result of the controversy, the objection comes with ill grace from one who is solely responsible for such non-surrender. A court of equity is seldom embarrassed by technicalities, and will make such a decree as the justice of the case manifestly requires. The cases above cited, which establish the proposition that the failure to take the proper steps to change the designation can only be taken advantage of by the company itself, are equally pertinent to show that it cannot be made available by one standing in the relation of Miss Cappella to this fund.

The case of Hainer v. Legion of Honor, 78 Iowa, 245, 43 N. W. 185, is instructive in this connection. In this case the deceased had made his certificate payable to his mother. Upon the back was a printed blank designed for changing the designation. After the issuance of the certificate, the insured married, and subsequently died, leaving a will, in which he bequeathed one-half of the amount due upon the certificate to his daughter. The association appeared, and paid into court the amount of the certificate. It was held that the mother, having known of the provisions of the will, and having made no objections thereto, but, on the contrary, having expressed her ac-

quiescence in the same, and taken possession of certain real property devised to her, and otherwise having availed herself of the benefits conferred upon her by the will, was estopped to claim the full amount of the certificate. The court held that, although a change of beneficiaries by will was not such a compliance with the regulations of the company as would entitle the person named in the will to recover, yet the company having disclaimed any interest in the controversy by the payment of the money into court, the original beneficiary was estopped by her conduct in taking under the will to repudiate the provision by which one-half of the certificate was bequeathed to the daughter. The case of Marsh v. Supreme Council, 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382, is still more direct authority to the point that the original beneficiary cannot avail herself of her own misconduct to allege that the insured did not comply with the requirements of the association.

There must be a decree awarding one-third of the fund to defendant Cappella, and the residue to the defendant Julius Kratzsch, with costs against Miss Cappella.

LAW v. GEORGE NEWNES, Limited.

(Scotch Court of Sessions, Second Division, 1894. 21 R. 1027, 31 Scot. Law Rep. 888.)

The proprietors of the Tit-Bits newspaper advertised that if any purchaser of a copy of Tit-Bits was killed by accident while traveling in a public carriage, having the paper in his possession at the time of his death, £100. would be paid to the person who should be decided by the proprietors of the paper to be the next of kin of the deceased. A person having met his death under the circumstances specified, the proprietors duly paid the sum promised to the widow of the deceased. His next of kin under the law of Scotland thereupon instituted these proceedings as upon a policy of insurance.[32]

Lord YOUNG. * * * The appeal is brought in this case on the question whether there is not here an undertaking by the proprietors of Tit-Bits to pay £100. to the next of kin, according to the law of Scotland, of the person killed by the accident described in the case. The money has been paid to the widow of the deceased, and the Lord Ordinary says that the widow is certainly not the next of kin or one of the next of kin according to the law of Scotland, nor, so far as he knows, according to the law of England, but that the defenders' obligation was, not to pay the money to the next of kin according to the law of Scotland or according to the law of England, but to whomever should be decided by the proprietors of Tit-Bits to be the next of kin of the deceased. That was the defenders' obligation, assum-

[32] The facts are restated, and a part of Lord Young's opinion, intimating that no contract liability existed in the premises, is omitted.

ing there was any obligation upon them at all. I cannot say that there was anything dishonourable or contrary to any legal obligation in the proprietors of Tit-Bits saying—"We think that the widow is the next of kin of the deceased man, and that she is the most proper person to receive the £100. promised in the advertisement." It is enough for us to say that in our opinion there was no contract obligation enforceable against the proprietors of Tit-Bits by those who are the next of kin of the deceased man according to the law of Scotland. In my opinion the case should be dismissed.[33] * * *

II. Assignees

WARNOCK v. DAVIS.

(Supreme Court of the United States, 1881. 104 U. S. 775, 26 L. Ed. 924.)

See ante, p. 170, for a report of the case.

LAKE v. NEW YORK LIFE INS. CO.

(Supreme Court of Louisiana, 1908. 120 La. 971, 45 South. 959.)

See ante, p. 174, for a report of the case.

GRIGSBY v. RUSSELL.

(Supreme Court of the United States, 1911. 222 U. S. 149, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. [N. S.] 642, Ann. Cas. 1913B, 863.)

See ante, p. 176, for a report of the case.

[33] Designation of Beneficiary.—Only such beneficiaries may be designated in mutual benefit certificates as are allowed by the rules of the society. See Kirkpatrick v. Modern Woodmen, 103 Ill. App. 468 (1902); Gillam v. Dale, 69 Kan. 362, 76 Pac. 861 (1904); Supreme Council Am. Legion of Honor v. Smith, 45 N. J. Eq. 466, 17 Atl. 770 (1889).

Where one of two beneficiaries named in a certificate was ineligible, it was contended that the certificate was rendered thereby void; or that in any event the eligible beneficiary was entitled to only one-half the sum stipulated in the certificate. But the court held that she might take the whole. See Cunat v. Supreme Tribe of Ben Hur, 249 Ill. 448, 94 N. E. 925, 31 L. R. A. (N. S.) 1192, Ann. Cas. 1912A, 213 (1911).

A false description of the beneficiary will not avoid the policy if the person intended is clearly designated. Thus in Mutual Life Ins. Co. v. Cummings, 66 Or. 272, 126 Pac. 982, 133 Pac. 1169, 47 L. R. A. (N. S.) 252 (1913) the policy was payable to "E. M. Cummings, his wife." The policy was held payable to the insured's paramour, whom he held out as his wife, and not to his legal wife from whom he was separated. See extensive note, 47 L. R. A. (N. S.) 252.

For a collection of the cases dealing with the designation of beneficiaries in mutual benefit associations, see 1 Cooley, Briefs on Insurance, 796–822.

RAHDERS, MERRITT & HAGLER v. PEOPLE'S BANK OF MINNEAPOLIS.

(Supreme Court of Minnesota, 1911. 113 Minn. 496, 130 N. W. 16, Ann. Cas. 1912A, 299.)

See ante, p. 179, for a report of this case.

HARDY v. ÆTNA LIFE INS. CO.

(Supreme Court of North Carolina, 1910. 152 N. C. 286, 67 S. E. 767.)

See ante, p. 182, for a report of this case.

III. Creditors

DRYSDALE v. PIGGOTT.

(Court of Chancery, 1856. 8 De Gex, M. & G. 546.)

Lord Justice Knight Bruce.[34] In this case Pattison Drysdale had been indebted to the defendant, and his father, the present plaintiff, had become surety for his son, to secure the payment of the debt by instalments. As a part of this transaction, a policy had been effected in the name of the creditor on the life of the principal debtor, the expenses of effecting which, or a large part of them, had been charged to the principal debtor, and included in the sum for which his father became surety. It was properly conceded on the part of the defendant that in these circumstances the policy originally belonged to the father and son, or one of them, subject to the right of the creditor to apply the money assured by it in payment of his debt if necessary. Subsequently another premium became due, after a part but not the whole of the debt had been paid, and then upon the creditor applying to the father to pay the premium the father refused to do so, and thereby, so far as he was concerned, exposed the property to total destruction. I will assume in favor of the defendant that this refusal was the refusal of the son as well as of the father. Upon this refusal the creditor might have left the property to destruction; he did not do so, but chose to preserve it, which preservation must enure to the benefit of the father and son.

It has been ably argued for the defendant that the refusal to pay the premium was a repudiation of the policy—a giving up to the creditor of all the equitable title of the father and son to it. I think,

[34] The concurring opinion of Turner, L. J., is omitted.

however, that the conduct of the parties is not to be treated as having such an effect. If a creditor chooses to preserve a pledge, he preserves it for the benefit of the owners, subject to his lien for the debt and for the expenses incurred in preserving the pledge. The plaintiff therefore is entitled to the money assured by the policy on repaying to the defendant his advances, with interest. There will be no costs at the Rolls or of the appeal, the merits on each side being very small.[35]

SECTION 3.—RECOVERY OF PREMIUMS

AMERICAN MUT. LIFE INS. CO. v. MEAD.

(Appellate Court of Indiana, 1906. 39 Ind. App. 215, 79 N. E. 526.)

Action to recover premiums paid to the defendant company on a policy of insurance taken out upon the life of his mother-in-law, on the theory that such policy was void ab initio for lack of insurable interest, and was entered into by the plaintiff through a misapprehension of the law, of which the defendant was aware at the time it issued the policy and accepted said premium payments. Judgment for plaintiff.

MYERS, C. J.[36] * * * Having determined that the policy was void, it necessarily follows that appellant thereby incurred no risk or liability by reason thereof, and without some risk or liability any assessments paid by appellee were without consideration, and must

[35] See, in accord, Babcock v. Bonnell, 80 N. Y. 244 (1880); Crotty v. Insurance Co., 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566 (1892); Exchange Bank v. Loh, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372 (1898).

"The law is well settled in this state that a creditor who, in pursuance of a bona fide effort to secure payment of his debt, insures the life of his debtor and takes the policy in his own name or for his own benefit, is entitled to the proceeds of the entire policy. Emerick v. Coakley, 35 Md. 193 (1872); Whiting v. Insurance Co., 15 Md. 326 (1860); Robinson v. Hurst, 78 Md. 59, 26 Atl. 956, 20 L. R. A. 761, 44 Am. St. Rep. 266 (1893); Rittler v. Smith, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844 (1889); Souder v. Home Friendly Society, 72 Md. 511, 20 Atl. 137 (1890). In Rittler v. Smith, supra, it is said, the creditor is in fact the owner of the policy, takes the risk of the continued solvency of the insurance company, and is obliged to keep the policy alive by paying the annual premiums during the life of the debtor, and the latter is under no obligation to do anything, and in fact does nothing in this respect. If he pays the debt to his creditor, he has only discharged his duty, and what interest has he in the policy, or in what his creditor may recover upon it? And such we find is also the English rule. Dalby v. Insurance Co., 15 C. B. 365 (1854); Ashley v. Ashley, 3 Sim. 149 (1829); Bruce v. Garden, L. R. 5 Ch. App. 32 (1869)."—Fitzgerald v. Rawlings Implement Co., 114 Md. 470, 79 Atl. 915, Ann. Cas. 1912A, 650 (1911).

[36] Portions of the opinion, dealing with a question of pleading and deciding that the plaintiff had no insurable interest in the life of his mother-in-law, in consequence of which the policy was void, are omitted.

be returned, provided the parties to the contract were not in pari delicto. Metropolitan Life Ins. Co. v. Bowser, 20 Ind. App. 557, 50 N. E. 86; Metropolitan Life Ins. Co. v. McCormick, 19 Ind. App. 49, 49 N. E. 44, 65 Am. St. Rep. 392; Waller v. Northern Assur. Co., 64 Iowa, 101, 19 N. W. 865; Joyce on Insurance, § 1390. If the parties to the contract were equally guilty, neither would have any standing in court to enforce an affirmative [remedy] against the other; the policy of the law being to leave them in the position regarding their rights under such illegal act precisely as they leave themselves. Hutchins v. Weldin, 114 Ind. 80, 15 N. E. 804; Budd v. Rutherford, 4 Ind. App. 386, 392, 30 N. E. 1111; Woodford v. Hamilton, 139 Ind. 481, 39 N. E. 47; American, etc., Ins. Co. v. Bertram, 163 Ind. 61, 70 N. E. 258, 64 L. R. A. 935; Blattenberger v. Holman, 103 Pa. 555, 558; Ruse v. Mutual, etc., Ins. Co., 23 N. Y. 516.

But this general rule has its exceptions "in cases where some statute provides a remedy, or perhaps in cases of oppression, or peculiar hardship, or those where public policy clearly necessitates the court's interference," and cases where from the facts disclosed the parties are not in pari delicto. Joyce on Insurance, § 1405; Pomeroy, Eq. Jur. §§ 941, 942. Consequently we are led to inquire into the position occupied by each of these parties relative to this illegal transaction. For it has been said that "a court of equity may, in the furtherance of justice and of a sound public policy," grant relief to the more innocent of the parties involved in the illegality, upon the theory that they are not in pari delicto; "that is, both have not, with the same knowledge, willingness, and wrongful intent, engaged in the transaction, or the undertakings of each are not equally blameworthy." Pomeroy, Eq. Jur. § 942.

In this latter section of Pomeroy it is also said that this relief may exist in two distinct classes of cases. "(1) It exists where the contract is intrinsically illegal, and is of such a nature that the undertakings or stipulations of each, if considered by themselves alone, would show the parties equally in fault, but there are collateral and incidental circumstances attending the transaction, and affecting the relations of the two parties, which render one of them comparatively free from fault. Such circumstances are imposition, oppression, duress, threats, undue influence, taking advantage of necessities or of weakness, and the like, as a means of inducing the party to enter into the agreement, or of procuring him to execute and perform it after it had been voluntarily entered into. (2) The condition also exists where, in the absence of any incidental and collateral circumstances, the contract is illegal, but is intrinsically unequal; is of such a nature that one party is necessarily innocent as compared with the other; the stipulations, undertakings, and position of one are essentially less illegal and blameworthy than those of the others."

Respectable authority can be found holding that the doctrine thus announced in Pomeroy is not applicable to life insurance contracts. But in this jurisdiction the principle thus declared has been to a limited

extent applied to insurance contracts. In American, etc., Ins. Co. v. Bertram, supra, at pages 56, 57, of 163 Ind., at page 260 of 70 N. E. (64 L. R. A. 935), it is said: "The general rule is that an action will not lie to recover premiums paid upon an insurance which is illegal by reason of the policy being illegal by statute, or because of the illegality of the adventure insured"—citing authorities. "But it is held that this rule does not apply where there has been no fraud on the part of the plaintiff; where the policy is void because of innocent misrepresentations; where the plaintiff has been induced to take out the policy by the fraud of the insurer and is himself innocent; or where it is clear that the policy was not a wagering contract, but was taken out under a mistake in regard to the rights of the party insured." It having been made to appear in both paragraphs that the contract was illegal, the burden was upon appellee to exhibit in his complaint facts prima facie sufficient to bring his right to the return of premiums paid within some exception to the general rule.

Turning to the first paragraph of the complaint, for ought that appears, appellee made his application for the policy he received on the life of his mother-in-law of his own volition, and without any inducement, except from motives of pure speculation. * * * It does not appear what induced appellee to believe the contract was valid. If this belief was founded upon his ignorance of the law, then the maxim "ignorantia juris non excusat" applies, and as a general proposition will be rigidly enforced both at law and in equity, to the end that legal rights may be preserved and a definite system established for the guidance of human conduct. Courts should and do proceed with great caution in affording relief grounded on such mistakes. While many cases are recorded where courts of equity have afforded parties relief from mistakes of law, yet none will be found not supported by special facts impelling a court of equity to interfere to prevent an unconscionable advantage of one party over another, brought about solely by an undue influence or through inequitable conduct practiced by the party receiving the fruits of the illegal transaction. This principle of relief is grounded upon a rule of equity aimed at the wrongdoer, effective to prevent such party taking advantage of his own wrong against an innocent party. Stockwell v. State, 101 Ind. 1, 8; Wabash R. R. Co. v. Kelley, 153 Ind. 119, 123, 52 N. E. 152, 54 N. E. 752. The demurrer to the first paragraph should have been sustained.

The facts averred in the second paragraph pertinent to the question under consideration, in substance, show that appellant solicited appellee "to take a certificate of insurance issued by it upon the life of one Hannah Hammond, who was the mother-in-law of the plaintiff; that defendant represented to the plaintiff that a certificate so taken by him upon the life of his said mother-in-law would be valid and in full force and effect as between the parties, and the plaintiff believed such statements and representations so made and relied upon the same, and took

said certificate; * * * that appellee had no insurable interest in the life of the insured, and such certificate for that reason was void, as appellant well knew at the time of issuing said certificate, and at the time of receiving from appellee payments of assessments and membership fee. From anything appearing in the pleading, the representation of appellant relied on by appellee was as to the legal effect of a contract based upon facts fully known to both of the parties. They seem to have been upon an equal footing as to the facts and opportunities of knowing the law applicable to such contracts.

But it is averred that appellant knew its legal effect, and appellee did not. Why he relied upon the knowledge of appellant in this regard does not appear. In Daily v. Board, 165 Ind. 99, 106, 74 N. E. 977, the court quotes with approval from Black v. Ward, 27 Mich. 191, 15 Am. Rep. 162, the following: "There is no presumption in this country that every person knows the law. It would be contrary to common sense and reason, if it were so." Therefore the fundamental maxim, "Ignorance of the law will not excuse," may in equity be relaxed, as said in the Bertram Case, supra, "where the mistake was induced or encouraged by the misrepresentations of the other party to the transaction, and the plaintiff, through misapprehension or mistake of the law, assumes obligations, or gives up a private right of property, upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief, if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot, in conscience, retain the benefit or advantage so acquired." Bales v. Hunt, 77 Ind. 355; Parish v. Camplin, 139 Ind. 1, 14, 37 N. E. 607; Chalfant v. Payton, 91 Ind. 202, 208, 46 Am. Rep. 586; Work v. American, etc., Ins. Co., 31 Ind. App. 153, 156, 157, 67 N. E. 458.

What we have said in passing on the sufficiency of the first paragraph is largely applicable to the second. In our judgment the demurrer to this paragraph should have been sustained.

Judgment reversed, with instructions to sustain the demurrer to each paragraph of the complaint, with leave to amend.[37]

[37] See, in accord, Harse v. Pearl Life Assur. Co. [C. A., 1904] 1 K. B. 558, reversing [1903] 2 K. B. 92.

The rule adopted in the principal case seems to be almost universally accepted when the policy is rendered void by the fraudulent misrepresentations or misconduct of the insured who is seeking to recover premiums paid. See Ætna Life Ins. Co. v. Paul, 10 Ill. App. 431 (1882); Schwartz v. U. S. Ins. Co., 3 Wash. C. C. 170, Fed. Cas. No. 12,505 (1812); Elliott v. Knights of Modern Maccabees, 46 Wash. 320, 89 Pac. 929, 13 L. R. A. (N. S.) 856 (1907); Wilson v. Ducket, 3 Burr. 1361 (1762).

But as a general rule, contra to the principal case, the insured is allowed to recover premiums paid on a policy void ab initio for some cause not involving any fraud on his part. See Connecticut Mutual Life Ins. Co. v. Pyle, 44 Ohio St. 19, 4 N. E. 465, 58 Am. Rep. 781 (1886); Delavigne v. United States Insurance Co., 1 Johns. Cas. (N. Y.) 310 (1800). In Metropolitan Life Ins. Co. v. Blesch (Ky.) 58 S. W. 436 (1900), it was flatly held that,

under facts similar to those of the principal case, the insured might recover premiums paid under a mere mistake of law.

There certainly should be a recovery when there has been fraud or overreaching on the part of the insurer or its agents. See British Workmen's & General Assurance Co. v. Cunliffe, 18 Times L. R. 425, 502 (1902); McDonald v. Metropolitan Life Ins. Co., 68 N. H. 4, 38 Atl. 500, 73 Am. St. Rep. 548 (1894).

The plaintiff should also be granted a recovery when the policy has been wrongfully rescinded by the insurer. See Slocum v. Northwestern National Life Ins. Co., 135 Wis. 288, 115 N. W. 796, 14 L. R. A. (N. S.) 1110, 128 Am. St. Rep. 1028 (1908); Summers v. Mutual Life Ins. Co., 12 Wyo. 369, 75 Pac. 937, 66 L. R. A. 812, 109 Am. St. Rep. 992 (1904); Hogben v. Metropolitan Life Ins. Co., 69 Conn. 503, 38 Atl. 214, 61 Am. St. Rep. 53 (1897); Mailhoit v. Metropolitan Life Ins. Co., 87 Me. 374, 32 Atl. 989, 47 Am. St. Rep. 336 (1895).

A return or tender of premiums paid is not a condition precedent to the insurer's defense that the policy is void ab initio by reason of the insured's fraud or breach of condition (United States Life Ins. Co. v. Smith, 34 C. C. A. 506, 92 Fed. 503 [1899]; National Mut. Fire Ins. Co. v. Duncan, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. [N. S.] 340 [1908]; Provident Sav. Life Assur. Soc. v. Whayne, 131 Ky. 84, 93 S. W. 1049 [1906]), unless such return is required by the terms of the policy (Continental Life Ins. Co. v. Busby, 3 Willson, Civ. Cas. Ct. App. [Tex.] § 101 [1890]; note, 13 L. R. A. [N. S.] 884), or by statute (Lavin v. Empire Life Ins. Co., 101 Mo. App. 434, 74 S. W. 366 [1903]).

But it is otherwise where the insurer by affirmative proceedings asks the cancellation of a policy because of the insurer's breach of condition. In such case, asking equity, he must offer equity and tender premiums paid. See American Cent. Life Ins. Co. v. Rosenstein (Ind. App.) 88 N. E. 97 (1909); Modern Woodmen v. Angle, 127 Mo. App. 94, 104 S. W. 297 (1907); Whittingham v. Thornburgh, 2 Vern. 206 (1690); DeCosta v. Scandret, 2 P. Wms. 170 (1723); Prince of Wales, etc., Ass'n Co. v. Palmer, 25 Beav. 605 (1858). This rule has been held applicable, even though the policy expressly stipulates that the premiums paid shall be forfeited upon breach of condition. See Metropolitan Life Ins. Co. v. Freedman, 159 Mich. 114, 123 N. W. 547, 32 L. R. A. (N. S.) 298 (1909).

Policy Payable to Beneficiary.—When a policy payable to a third party as beneficiary is wrongfully rescinded by the insurer, the right to recover the premiums paid is in the insured, who paid them, and not in the beneficiary. See Slocum v. Northwestern Nat. Life Ins. Co., 135 Wis. 288, 115 N. W. 796, 14 L. R. A. (N. S.) 1110, 128 Am. St. Rep. 1028 (1908); McDonald v. Metropolitan Life Ins. Co., 68 N. H. 4, 38 Atl. 500, 73 Am. St. Rep. 548 (1894); Sullivan v. Metropolitan Life Ins. Co., 174 Mass. 467, 54 N. E. 879, 75 Am. St. Rep. 365 (1899).

SECTION 4.—SUBROGATION

CASTELLAIN v. PRESTON.[38]

(Court of Appeal, 1883. L. R. 11 Q. B. D. 380.)

Appeal of the plaintiff from the judgment of Chitty, J., in favour of the defendants. The facts are fully stated in the report of the proceedings before Chitty, J., 8 Q. B. D. 613, and it is necessary here only to briefly recapitulate them.

The plaintiff sued on behalf of the London, Liverpool & Globe Insurance Company to recover a sum of £330. with interest since the 25th of September, 1878. On the 25th of March, 1878, the defendants, as owners of certain lands and buildings in Liverpool, effected an insurance on the buildings against loss by fire, and they kept the policy on foot by payment of the premiums until after the fire hereinafter mentioned occurred. The policy was in the usual form, giving the insurers the option of reinstating the property. On the 31st of July, 1878, the defendants contracted to sell the land and the buildings to their tenants, Messrs. Rayner, for the sum of £3100., and they received a deposit. The contract provided that the time of the completion should be such day within two years from the date as the vendors should name. On the 15th of August in the same year a fire occurred damaging part of the buildings. A claim was made on behalf of the defendants, and after negotiation as to the sum to be paid, the amount of the claim was ultimately fixed at £330., and that sum was in fact paid on the 25th of September, 1878, by the insurers, who were at that time ignorant of the existence of the contract for sale. On the 25th of March, 1879, the defendants named the 5th of May as the day of completion, and on the following 12th of December the conveyance was executed and the balance of the purchase-money paid. * * *

Brett, L. J. In this case the action is brought by the plaintiff as representing an insurance company against the defendants in respect of money which has been paid by that company to the defendants on account of the loss by fire of a building. The defendants were the owners of property consisting partly at all events of a house, and the defendants had made a contract of sale of that property with third persons, which contract upon the giving of a certain notice as to the time of payment would oblige those third persons, if they fulfilled the contract, to pay the agreed price for the sale of that prop-

[38] This action was brought in consequence of the judgment in Rayner v. Preston, ante, p. 643.

erty, a part of which was a house, and according to the peculiarity of such a sale and purchase of land or real property the vendees would have to pay the purchase-money, whether the house was, before the date of payment, burnt down or not. After the contract was made with the third persons, and before the day of payment, the house was burnt down. The vendors, the defendants, having insured the house in the ordinary form with the plaintiff's company, it is not suggested that upon the house being burnt down the defendants had not an insurable interest. They had an insurable interest, as it seems to me, first, because they were at all events the legal owners of the property; and, secondly, because the vendees or third persons might not carry out the contract, and if for any reason they should never carry out the contract, then the vendors, if the house was burnt down, would suffer the loss. Upon the happening of the fire the defendants made a claim on the insurance company represented by the plaintiff, and were paid a certain sum which represented the damage done to the house. After that, the contract of sale between the defendants and the third persons, the vendees of the property, was carried out, and the full amount of the purchase-money was paid by the third persons to the defendants notwithstanding the fire. Under those circumstances the plaintiff representing the insurance company brings this action; I do not say that he brings it to recover back the money which has been paid by the insurance company (for that expression of opinion would rather interfere with the form of the action), but he brings the action in respect of that money.

The question is whether this action is maintainable. The case was tried before Chitty, J., and he, in a very careful and elaborate judgment, 8 Q. B. D. 613, at p. 615, has come to the conclusion that the insurance company cannot recover against the defendants in respect of the money paid by them. It seems to me that the foundation of his judgment is this, that he considers that the doctrine of subrogation of the insurer into the position of the assured is confined within limits, which prevent it from extending to the present case. I must now consider whether I can agree with him.

In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured obtaining a full indemnity, or which will give

to the assured more than a full indemnity, that proposition must certainly be wrong. * * *

I have mentioned the doctrine of notice of abandonment for the purpose of coming to the doctrine of subrogation. That doctrine does not arise upon any of the terms of the contract of insurance; it is only another proposition which has been adopted for the purpose of carrying out the fundamental rule which I have mentioned, and it is a doctrine in favour of the underwriters or insurers in order to prevent the assured from recovering more than a full indemnity; it has been adopted solely for that reason. It is not, to my mind, a doctrine applied to insurance law on the ground that underwriters are sureties. Underwriters are not always sureties. They have rights which sometimes are similar to the rights of sureties, but that again is in order to prevent the assured from recovering from them more than a full indemnity. But it being admitted that the doctrine of subrogation is to be applied merely for the purpose of preventing the assured from obtaining more than a full indemnity, the question is, whether that doctrine as applied in insurance law can be in any way limited. Is it to be limited to this, that the underwriter is subrogated into the place of the assured so far as to enable the underwriter to enforce a contract, or to enforce a right of action? Why is it to be limited to that, if when it is limited to that, it will, in certain cases, enable the assured to recover more than a full indemnity? The moment it can be shown that such a limitation of the doctrine would have that effect, then, as I said before, in my opinion, it is contrary to the foundation of the law as to insurance, and must be wrong. And, with the greatest deference to my Brother Chitty, it seems to me that that is the fault of his judgment. He has by his judgment limited this doctrine of subrogation to placing the insurer in the position of the assured only for the purpose of enforcing a right of action, to which the assured may be entitled. In order to apply the doctrine of subrogation, it seems to me that the full and absolute meaning of the word must be used, that is to say, the insurer must be placed in the position of the assured. Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavour to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished.

That seems to me to put this doctrine of subrogation in the largest possible form, and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated. But it will be observed that I use the words "of every right of the assured." I think that the rule does require that limit. In Burnand v. Rodocanachi, 7 App. Cas. 333, the foundation of the judgment to my mind was, that what was paid by the United States government could not be considered as salvage, but must be deemed to have been only a gift. It was only a gift to which the assured had no right at any time until it was placed in their hands. * * * This enlargement, or this explanation, of what I consider to be the real meaning of the doctrine of subrogation, shews that in my opinion it goes much further than a mere transfer of those rights which may at any time give a cause of action either in contract or in tort, because if upon the happening of the loss there is contract between the assured and a third person, and if that contract is immediately fulfilled by the third person, then there is no right of action of any kind into which the insurer can be subrogated. The right of action is gone; the contract is fulfilled. In like manner if upon the happening of a tort the tort is immediately made good by the tort feasor, then the right of action is gone; there is no right of action existing into which the insurer can be subrogated. It will be said that there did for a moment exist a right of action in favour of the assured, into which the insurer could have been subrogated. But he cannot be subrogated into a right of action until he has paid the sum insured and made good the loss. Therefore innumerable cases would be taken out of the doctrine, if it were to be confined to existing rights of action. And I go further and hold that if a right of action in the assured has been satisfied, and the loss has been thereby diminished, then, although there never was nor could be any right of action into which the insurer could be subrogated, it would be contrary to the doctrine of subrogation to say that the loss is not to be diminished as between the assured and the insurer by reason of the satisfaction of that right.

I fail to see at present if the present defendants would have had a right of action at any time against the purchasers, upon which they could enforce a contract of sale of their property whether the building was standing or not, why the insurance company should not have been subrogated into that right of action. But I am not prepared to say that they could be, more particularly as I understand my learned Brother, who knows much more of the law as to specific performance than I do, is at all events not satisfied that they could. I pass by the question without solving it, because there was a right in the defendants to have the contract of sale fulfilled by the purchasers notwithstanding the loss, and it was fulfilled. The assured have had the advantage therefore of that right, and by that right, not by a gift which

the purchasers could have declined to make, the assured have recovered, notwithstanding the loss, from the purchasers, the very sum of money which they were to obtain whether this building was burnt or not. In that sense I cannot conceive that a right, by virtue of which the assured has his loss diminished, is not a right which, as has been said, affects the loss. This right which was at one time merely in contract, but which was afterwards fulfilled, either when it was in contract only, or after it was fulfilled, does affect the loss; that is to say, it affects the loss by enabling the assured, the vendors, to get the same money which they would have got if the loss had not happened.

While I am applying the doctrine of subrogation which I have endeavoured to enunciate, I think it due to Chitty, J., to point out what passages in his judgment require some modification. 8 Q. B. D. at p. 617. I find him reading this passage: "I know of no foundation for the right of underwriters, except the well known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or re-imbursed himself for the loss." That is a quotation from Lord Cairns in Simpson v. Thomson, 3 App. Cas. 279, at p. 284. The learned judge then goes on: "What is the principle of subrogation? On payment the insurers are entitled to enforce all the remedies, whether in contract or in tort, which the insured has against third parties, whereby the insured can compel such third parties to make good the loss insured against." That is, as it seems to me, to confine this doctrine of subrogation to the principle that the insurers are entitled to enforce all remedies, whether in contract or in tort. I should venture to add this—"and if the assured enforces or receives the advantage of such remedies, the insurers are entitled to receive from the assured the advantage of such remedies." Then when we come to this illustration, "Where the landlord insures, and he has a covenant by the tenant to repair, the insurance office, on payment in like manner, succeeds to the right of the landlord against his tenant." I would add this—"and if the tenant does repair, the insurer has the right to receive from the assured a benefit equivalent to the benefit which the assured has received from such repair." Then, dealing with the case of Burnand v. Rodocanachi, 7 App. Cas. 333, the learned judge cites the opinion of Bramwell, L. J., 8 Q. B. D. at p. 618. He says that Bramwell, L. J., in his judgment held that it was not salvage, but "that in the circumstances the sum received by the shipowner was but a pure gift, and there was no right on the part of the insurers to recover any part of it over against him." I, for myself, venture to add this as the reason, "because there was no right in the assured to demand the compensation from the American government." There

was no right to demand it; it was bestowed and received as a pure gift.

Darrell v. Tibbitts, 5 Q. B. D. 560, seems to me to be entirely in favour of the plaintiff in this case. I shall not retract from the very terms which I used in that case. It seems to me that in Darrell v. Tibbitts, 5 Q. B. D. 560, the insurers were not subrogated to a right of action or to a remedy. They were not subrogated to a right to enforce the remedy, but what they were subrogated into was the right to receive the advantage of the remedy which had been applied, whether it had been enforced or voluntarily administered by the person who was bound to administer it. That seems to me to be the doctrine. Then with regard to the passage 5 Q. B. D. at p. 563: "The doctrine is well established that where something is insured against loss, either in a marine or a fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter insured." I wish to explain that that was a distinct clause, and it was so intended by me when I stated it. I then mentioned contracts: "And with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by reason of the peril insured against." I fail to conceive any contract which gives a right over the thing insured, which is not affected by the loss or safety of it, and if it is necessary to bring the present case within those terms, it seems to me that the contract of purchase and sale was affected by that loss.

I will not go further with the judgment of Chitty, J., except to say this, that at the end my learned Brother has put it thus, that "the only principle applicable is that of subrogation as understood in the full sense of that term." 8 Q. B. D. at p. 625. There I agree with him, only my view of the full sense is larger than that which he adopted. "And that where the right claimed is under a contract between the insured and third parties, it must be confined to the case of a contract relating to the subject-matter of the insurance, which entitled the insurers to have the damages made good." I think it would be better expressed in this way—"which entitles the assured to be put by such third parties into as good a position as if the damage insured against had not happened." If it is put in that sense, it seems to me to be consistent with the proposition which I laid down at the beginning of what I have said, and to cover this case. I will repeat it, "which entitles the assured to be put by such third parties into as good a position as if the damage insured against had not happened."

The contract in the present case, as it seems to me, does enable the assured to be put by the third party into as good a position as if the fire had not happened, and that result arises from this contract alone.

Therefore, according to the true principles of insurance law, and in order to carry out the fundamental doctrine, namely, that the assured can recover a full indemnity, but shall never recover more, except, perhaps, in the case of the suing and labouring clause under certain circumstances, it is necessary that the plaintiff in this case should succeed. The case of Darrell v. Tibbitts, 5 Q. B. D. 560, has cut away every technicality which would prevent a sound decision. The doctrine of subrogation must be carried out to the full extent, and carried out in this case by enabling the plaintiff to recover.[39]

Judgment reversed.[40]

LEYDEN v. LAWRENCE.

(Court of Chancery of New Jersey, 1911. 79 N. J. Eq. 113, 81 Atl. 121.)

See ante, p. 594, for a report of the case.

FIRE ASSOCIATION OF PHILADELPHIA v. WELLS.

(Court of Chancery of New Jersey, 1914. 90 Atl. 244.)

Bill by the Fire Association of Philadelphia against Thomas Wells. Decree for complainant.

Defendant was the owner of certain buildings and their contents, which have been totally destroyed by fire caused by the negligence of a railroad company. The buildings were protected by fire insurance written by complainant company to the amount of $2,000. After the fire complainant company paid the $2,000 insurance to defendant, and received from defendant a receipt for the money, in which receipt defendant formally assigned to complainant his claim against the railroad company to that amount. Thereafter defendant, without the knowledge of complainant, made a settlement with the railroad company, whereby he received from that company $5,000 and executed a general release, discharging the railroad company from all liability by reason of the fire.

Complainant now seeks to recover from defendant its loss of $2,000.

[39] Part of the opinion of Brett, L. J., and the concurring opinions of Cotton, L. J., and Bowen, L. J., are omitted.

[40] The American courts have manifested an unwillingness to extend the rule of subrogation as far as was done in the principal case. See Foley v. Insurance Co., 152 N. Y. 131, 134, 46 N. E. 318, 43 L. R. A. 664 (1897); Heller v. Royal Insurance Co., 177 Pa. 262, 35 Atl. 726, 34 L. R. A. 600 (1896); Insurance Co. v. Updegraff, 21 Pa. 513 (1853); King v. State Ins. Co., 7 Cush. (Mass.) 1, 54 Am. Dec. 683 (1855); International Trust Co. v. Boardman, 149 Mass. 158, 161, 21 N. E. 239 (1889); William Skinner & Sons' Dock Co. v. Houghton, 92 Md. 68, 48 Atl. 85, 84 Am. St. Rep. 485 (1900); Washington Fire Ins. Co. v. Kelly, 32 Md. 421, 3 Am. Rep. 149 (1870). See Richards on Insurance (3d Ed.) 66–69.

By way of defense defendant claims that, when he accepted the insurance money and executed the subrogation receipt in behalf of complainant, he was informed by the agent who paid him the money that he would be privileged to settle with the railroad company for the balance of his loss, and also claims that in making his settlement with the railroad company he settled for only the balance of his loss, and at that time apprised the railroad company of the fact that he had received the $2,000 insurance money, and had executed a subrogation receipt to complainant insurance company for that amount.

LEAMING, V. C. (after stating the facts as above). It was complainant's right and privilege to pay to defendant the amount of the insurance, and by that payment to become subrogated to defendant's claim against the railroad company to the extent of the amount paid. No "subrogation receipt" or other receipt or agreement was necessary; subrogation arose from the act of payment, and not from the convention. Monmouth Co. Fire Ins. Co. v. Hutchinson, 21 N. J. Eq. (6 C. E. Gr.) 107; Weber v. Morris & Essex R. R. Co., 35 N. J. Law (6 Vr.) 409, 413, 10 Am. Rep. 253; Sheldon on Subrogation, § 6. But a writing was executed. That writing was signed by defendant, and formally acknowledged by him before a notary public. It sets forth the payment of the insurance money, and assigns to complainant defendant's claim against the railroad company to the amount of the payment. The receipt does no more than state the exact conditions which would have existed by operation of law without a receipt. Defendant claims that he was induced to accept the insurance money and sign the receipt by a statement of the insurance agent that the payment and receipt would not, in any way, interfere with defendant collecting the balance of his loss from the railroad company. The writing which was executed is silent touching any such privilege to be extended to defendant, and the agent denies that any such statement was made. But the views which I entertain render it wholly immaterial whether any such statement was made or not.

While defendant claims to have made settlement with the railroad company for only the balance of his claim, and claims to have fully apprised the railroad company of the circumstances that the insurance money had been theretofore paid to him, he in fact executed to the railroad company a written general release of liability from all claims resulting from the fire; in order to procure his own money he consented to formally release the railroad company from its liability to complainant, and did this without the knowledge or consent of complainant. In making that settlement and in executing that instrument defendant was not acting in ignorance of his rights and duties in the slightest degree; the settlement was made under the immediate direction of his

counsel. Touching that settlement, his counsel has testified as follows: "He [defendant] came to my office for the purpose of getting me to go with him to the railroad company. I went. It was stated on that occasion to the railroad's agents, Mr. Brister, their general agent, being present, and one or two others, that Mr. Wells [defendant] had accepted $2,000 from the insurance company, and that he had signed subrogation receipts. It was then stated by me to the railroad company what Mr. Wells has testified to here before this court; it was further stated by me to the railroad company that they were running some risk of a lawsuit in this matter, to which Mr. Brister replied he would take the responsibility of that and take care of it."

Under these circumstances, and with full appreciation of the fact that complainant was the equitable owner of a part of his claim against the railroad company, defendant executed a formal instrument, releasing the railroad company from all liability for the losses occasioned by the fire, and now seeks to repudiate the terms and appropriate effect of his own deliberative written instrument, and to hold against the terms of his own declarations by the claim that he informed the railroad company that he had assigned a part of his claim to complainant, and in fact made settlement of the balance only. It must be assumed that, under the circumstances narrated, some purpose existed for the execution of an instrument which in terms released complainant's claim, for, as already stated, defendant knew that he had no right to release complainant's claim without first receiving from the railroad company, for complainant, complainant's money; whatever that purpose may have been, the legal effect of the act was to place in the hands of the railroad company an instrument which was operative as a bar to complainant's recovery of its claim against the railroad company unless complainant should be able to establish as a fact, to the satisfaction of a jury in an action against the railroad company, that prior to the execution of that instrument the railroad company had been apprised of complainant's rights. It thus appears that defendant not only had no right to execute the release of complainant's claim, but necessarily knew that he had no such right, and, under the circumstances of the settlement, as disclosed by the testimony of his counsel, necessarily knew that the release which he executed was operative as a prima facie bar to complainant's right of recovery against the railroad company.

It may well be doubted whether a person who has sustained a loss, and who holds partial indemnity from a company who is entitled to be subrogated to the amount of the indemnity, is privileged, as against the indemnifying company, to make a compromise settlement with a company who is primarily liable for the whole loss, without the knowledge or co-operation of the indemnifying company. Commercial Union Assurance Co. v. Lister, L.

R. 9 Chancery Appeal Cases, 483. But it is entirely clear that the owner of the legal title to the two concurrent claims, in making such settlement without the knowledge or co-operation of the indemnifying company, whether the settlement should be of the whole claim or only of that part in excess of the amount of the indemnity, assumes the burden of equitable duties to the indemnifying company, which are at least coextensive with all rights which the indemnifying company could assert or preserve if present and participating in the settlement. In such circumstances the execution of a release of complainant's claim was not only a breach of the trust assumed and a substantial injury to the enforcement of complainant's rights, but plainly imposed upon defendant a further duty to apprise complainant of his acts in the premises, to the end that the prima facie bar to complainant's recovery which he had wrongfully created could be removed. That duty was not performed, and the statute has now run. In executing the general release under the circumstances stated, defendant has equitably denied himself the defense that he settled for only the balance of his loss.

I am convinced that defendant's conduct in making settlement with the railroad company without the knowledge or co-operation of complainant, and in executing a general release to the railroad company in consideration of the money by him received at that settlement without apprising complainant of the facts which he now asserts, is operative to render him presently liable to complainant in this suit for that part of the loss paid by complainant. I will advise a decree to that effect.

FAYERWEATHER et al. v. PHENIX INS. CO.

(Court of Appeals of New York, 1890. 118 N. Y. 324, 23 N. E. 192, 6 L. R. A. 805.)

Appeal from Superior Court of New York City, General Term. Action by Daniel B. Fayerweather and Henry S. Ladew against the Phenix Insurance Company. A judgment dismissing the complaint was affirmed by the General Term of the Superior Court, and plaintiffs appeal.

FOLLETT, C. J. The plaintiffs were the owners of 211 bales of leather, which the Old Dominion Steam-Ship Company undertook to transport by its steamer Guyandotte from Norfolk, Va., to New York, and deliver to the owners. The vessel reached New York June 17, 1885, with the leather safe on board, and within twenty-four hours after arrival she sunk at her dock through the negligence of the employees of the steamship company. By this accident the leather was injured, as it is agreed, to the plaintiffs' damage in the sum of $1,295.32. In considering this case the liability

of the carrier to the owners of the leather for this loss will be assumed.

The bill of lading under which the leather was shipped contained this provision: "It is further stipulated and agreed that in case of any loss, detriment, or damage to be sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred by the terms of this contract, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of happening of such loss, detriment, or damage, *and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.*"

The defendant insured the plaintiffs against the loss sustained by them, by an open, time, marine policy, which contained these provisions: "In the event of loss, the assured agrees to subrogate to the insurers all their claims against the transporters of said merchandise, not exceeding the amount paid by said insurers. * * * In case of any agreement or act, past or future, by the insured, whereby any right of recovery of the insured, against any persons or corporations, is released or lost, which would, on acceptance of abandonment or payment of loss by this company, belong to this company, but for such agreement or act, or in case this insurance is made for the benefit of any carrier or bailee of the property insured other than the person named as insured, the company shall not be bound to pay any loss; but its right to retain or recover the premium shall not be affected."

This action is prosecuted by the assured owners to recover from the insurer their loss so sustained; and it is defended on the ground that the owners violated the provision of the contract of insurance above quoted by contracting with the carrier, without the insurer's knowledge, that the carrier, in case of liability for loss, should have the benefit of the insurance, and, in effect, that the insurer, on paying the owners' loss, should be deprived of its right to be subrogated to the owners' right of action against the carrier for injury to the leather. When goods in the hands of a common carrier for transportation are insured by the owner, and are subsequently lost or injured under circumstances rendering the carrier liable to the owner for the damages, and the insurer pays the loss to the owner, the insurer, in the absence of stipulations between the carrier and owner defeating the right, is entitled to be subrogated to the rights and remedies of the owner against the carrier. Hall v. Railroad Co., 13 Wall. 367, 20 L. Ed. 594; Insurance Co. v. Railway Co., 73 N. Y. 399, 29 Am. Rep. 171; Sheld. Subr. § 329. But the struggle between carriers and insurers to escape the liability imposed under the usual bills of lading and policies, by casting the burden of the loss upon the other by the insertion of unusual and astute provisions in their respective contracts with

the owner, has rendered this simple rule of law quite inapplicable to many of the cases arising under such special contracts.

The provision quoted from the bill of lading cut off the insurer's right to be subrogated to the rights and remedies of the owner against the defaulting carrier. Insurance Co. v. Calebs, 20 N. Y. 173; Platt v. Railroad Co., 52 N. Y. Super. Ct. 496, affirmed 108 N. Y. 358, 15 N. E. 393; Insurance Co. v. Transportation Co., 10 Biss. 18, Fed. Cas. No. 11,112, affirmed 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873, and 118 U. S. 210, 6 Sup. Ct. 1176, 30 L. Ed. 128. It has been held (Jackson Co. v. Insurance Co., 139 Mass. 508, 2 N. E. 103, 52 Am. Rep. 728), in an action by the owner against the insurer for the recovery of a loss covered by the policy, and caused by the actionable negligence of the carrier, that a stipulation between the owner and carrier, giving the latter the benefit of an insurance upon the goods, is not a defense to the insurer, and that a provision in the policy "that this insurance shall be void in case the policy, or the interest insured thereby, shall be sold, assigned, transferred, or pledged without the consent in writing of the insurer," is not violated by the agreement between the owner and carrier that the latter should have the benefit of any insurance on the goods carried.

In Inman v. Railway Co., 129 U. S. 128, 9 Sup. Ct. 249, 32 L. Ed. 612, the defendant, a common carrier, transported cotton, under a bill of lading which contained a stipulation that the carrier incurring any legal liability for the loss of the cotton "shall have the benefit of any insurance which may have been effected upon or on account of said cotton." The owners insured the cotton under policies which contained this stipulation: "And any act of the insured waiving or transferring, or tending to defeat or decrease, any such [the insurer's] claim against the carrier, or such other person or persons, whether before or after the insurance was made under this policy, shall be a cancellation of the liability of the said insurance company for or on account of the risk insured for which loss is claimed. In event of loss the assured agrees to subrogate to the insurers all their claims against the transporters of said cotton, not exceeding the amount paid by said insurers." The cotton was lost by the negligence of the carrier. The insurers adjusted the loss, but did not pay the owner, agreeing with him that he should sue the carrier without prejudice to his claims under the policies, and that interest should be allowed upon the claim as adjusted until it could be collected. The assured owner sued the carrier, which defended on the ground that by the stipulation in the bill of lading it was entitled to the insurance effected on the cotton, which the owner had nullified by accepting a policy containing the stipulation quoted. It was held that the stipulation in the policy was not a defense.

It is unnecessary to determine whether the reasons given for the

judgment in the case last cited can be harmonized with the reasons given for the judgments in the previous cases hereinbefore cited, because none of the cases determine the precise question presented in the case at bar. The plaintiffs in this action expressly stipulated that they would make no agreement, nor do any act, whereby their right of action against the carrier for losing or injuring the leather should be released or cut off, and that, in case the carrier became liable to the plaintiffs for losing or injuring the leather, the defendant, the insurer, on paying the loss, should be subrogated to their right of action against the carrier. By the contract entered into between the plaintiffs and the carrier, the rights stipulated for by the insurer have been wholly nullified and cut off, which defeats the plaintiffs' right to recover on the policy. Carstairs v. Insurance Co. (C. C.) 18 Fed. 473.

The judgment should be affirmed, with costs. All concur, except HAIGHT, J., not voting.

Judgment affirmed.

PFEILER v. PENN ALLEN PORTLAND CEMENT CO. et al.

(Supreme Court of Pennsylvania, 1913. 240 Pa. 468, 87 Atl. 623.)

Bill in equity by Ludwig Pfeiler against the Penn Allen Portland Cement Company and another. From a decree sustaining a demurrer and dismissing the bill, plaintiff appeals. Affirmed.

PER CURIAM. The plaintiff obtained a judgment in an action for personal injuries against the Penn Allen Portland Cement Company, which became insolvent and was adjudged a bankrupt. He filed a bill for subrogation to the rights of the cement company under an indemnity policy of accident insurance issued to it by the Ætna Life Insurance Company, and for a decree requiring the insurance company to pay to him the amount of his judgment against the cement company. The court sustained a demurrer and dismissed the bill.

The insurance policy provided that: "No action shall lie against the company to recover for any loss or expense under this policy unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issue, nor unless such action is brought within two years after payment of such loss or expense." The cement company has paid nothing and under the express terms of its contract it is not entitled to recover from the insurance company. Since it has no right of action, there is nothing to which the plaintiff could be subrogated. For this reason the bill was dismissed by the learned judge of the common pleas, and in the decree entered we fully concur.

The decree is affirmed, at the cost of the appellant.[41]

[41] LIFE AND ACCIDENT INSURANCE.—It is well settled that the doctrine of subrogation has no application to life insurance since it does not in any

CHAPTER X

CONSTRUCTION OF THE POLICY—PROPERTY INSURANCE

SECTION 1.—CONDITIONS OPERATIVE BEFORE LOSS

I. Sole and Unconditional Ownership

PHENIX INS. CO. v. HILLIARD.

(Supreme Court of Florida, 1910. 59 Fla. 590, 52 South. 799, 138 Am. St. Rep. 171.)

Appeal from an order overruling a demurrer to a bill in equity brought to reform and enforce a fire insurance policy. The bill alleged in substance that the complainant had purchased from the Malsby Company and installed in her saw-mill certain machinery; that in order to protect her interest in such machinery, as well as that of the Malsby Company, which had reserved title till all the purchase money should be paid, she had applied for insurance; that, although fully advised of all the facts relating to the ownership of such property, the agent of the defendant company had neglected to write the policy issued so that the Malsby Company would appear as the owner of the property insured, and its interest be protected; that the mistake in the form of the policy had not been discovered until after the property had been destroyed by fire, etc. The prayer was for reformation and enforcement of the contract, and for general relief. Defendant's demurrer to this bill was overruled.

Whitfield, C. J.[1] (after stating facts in detail). * * * In this case the policy expressly provides that it shall be void unless otherwise indorsed on the policy "if the interest of the insured be other than unconditional and sole ownership." An allegation of the bill of complaint is that Charlotte Hilliard requested the agent of the insurance company "to write a policy on said described property to protect herself and the said Malsby Company against loss by fire," and that

proper sense indemnify. See Mobile Life Ins. Co. v. Brame, 95 U. S. 754, 24 L. Ed. 580 (1877); Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265, 65 Am. Dec. 571 (1856).

The same principle is held applicable to accident insurance. See Ætna Life Ins. Co. v. J. B. Parker & Co., 96 Tex. 287, 72 S. W. 168, 580, 621 (1903); Gatzweiler v. Milwaukee Electric R. & L. Co., 136 Wis. 34, 116 N. W. 633, 18 L. R. A. (N. S.) 211, 128 Am. St. Rep. 1057, 16 Ann. Cas. 633 (1908).

[1] Part of the opinion is omitted.

through inadvertence, accident, or mistake the agent omitted the name of the Malsby Company as the owner of the machinery. The prayer is that the policy be so corrected or reformed as to show the Malsby Company to be the owners of the machinery, and the demurrer to the bill of complaint states that as matter of law the Malsby Company was not the owner of the machinery.

Where a purchaser of personal property takes possession of it, but the title remains in the vendor till the purchase price is paid in full, the vendee in possession has an insurable interest in the property, even though he has not fully paid for it. Reed v. Williamsburg City Fire Ins. Co., 74 Me. 537. But under the terms of the policy the insured must have the "unconditional and sole ownership" of the property. The interest of a purchaser of property, which he has unqualifiedly agreed to buy, and which the former owner has absolutely contracted to sell to him upon definite terms, is the "sole and unconditional ownership" within the true meaning of the ordinary clause upon that subject in insurance policies, because the vendor may compel the vendee to pay for the property and to suffer any loss that occurs. Insurance Co. of North America v. Erickson, 50 Fla. 419, 39 South. 495, 2 L. R. A. (N. S.) 512, 111 Am. St. Rep. 121, 7 Ann. Cas. 495; Phenix Ins. Co. of Brooklyn, N. Y., v. Kerr, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569; Rumsey v. Phenix Ins. Co. (C. C.) 1 Fed. 396; 8 Words and Phrases, 7154; 2 Cooley on Insurance, 1375; Richardson, Insurance (3d Ed.) 336.

Appellees contend that this rule does not apply to personal property, and cite 2 Clements on Fire Insurance, 170. The rule there announced has some support in cited cases where the vendor reserved the right to retake possession and ownership of the property. The facts in this case are not of that character.

The just and reasonable purpose of insurance policies in requiring the insured to have the "unconditional and sole ownership" of the property insured is to give protection to only those upon whom the loss insured against would inevitably fall but for the insurance, and to avoid taking risks for those whose lack of interest or whose contingent interest in the property insured might tend to encourage carelessness or wrongdoing in the use or preservation of the property. Wager policies are not approved and should be avoided.

A conditional sale of personal property by which the vendee takes possession of the property with an unconditional promise to pay for it, but the vendor retains the title till payment in full of the purchase price is made, confers upon the vendor the absolute right of the purchase price, and imposes upon the vendee the unconditional obligation to pay the purchase price, and also casts upon the vendee all the risks of loss incident to the full and complete ownership of the property, unless otherwise specially provided by contract. 6 Am. & Eng. Ency. Law (2d Ed.) 455.

To be "unconditional and sole," the interest or "ownership" of the insured must be completely vested, not contingent or conditional, nor in common or jointly with others, but of such nature that the insured must alone sustain the entire loss if the property is destroyed; and this is so whether the title is legal or equitable. Hartford Fire Ins. Co. v. Keating, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499.

By fair construction and intendment the "unconditional and sole ownership" of property for the purposes of insurance is in those upon whom the loss insured against would certainly fall, not as a matter of mere contract obligation, but as the result of real bona fide rights in the property insured.

The contract of sale in this case expressly reserved the title in the vendor till all the goods were paid for, with a provision that upon certain defaults and contingencies the vendor might take possession of the property, not for the purpose of resuming the ownership of it, but to sell it to make the purchase price out of it. The vendors were guaranteed against any loss or damage to the property by fire or other cause; and as an express stipulation the vendee was in no event entitled to a rescission of the contract or to an abatement in the price for any cause. These agreements expressly fixed the rights of the vendee, and the agreement to keep the property insured for the benefit of the vendor was only an additional security for the purchase price, and did not affect the vendee's interest or risks in the property.

While the vendor, the Malsby Company, did not have the "unconditional and sole ownership" of the machinery when the policy was issued, such vendor reserved the title for the purpose of securing the purchase price, and consequently had an insurable interest in the machinery. 19 Cyc. 588; 13 Am. & Eng. Enc. Law (2d Ed.) 181. The prayer for relief for the Malsby Company is on the ground that it is "the owner of said * * * machinery"; but it is alleged that it was mutually intended to enter into a contract that would protect the interests of the insured "according to their respective interests." Under this allegation, admitted by the demurrer, the real interest of the parties in all the property insured may be shown, and appropriate relief may be granted under the general prayer. 16 Cyc. 224; 18 Enc. Pl. & Pr. 867.

The order appealed from is affirmed, and the cause is remanded, with leave to amend if so desired.

SHACKLEFORD and COCKRELL, JJ., concur. TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

NANCE v. OKLAHOMA FIRE INS. CO.

(Supreme Court of Oklahoma, 1912. 31 Okl. 208, 120 Pac. 948, 38 L. R. A. [N. S.] 426.)

Action by L. A. Nance against the Oklahoma Fire Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

HAYES, J.[2] * * * One of the questions and answers thereto in the application is as follows: "Are you the sole and undisputed owner of the property to be insured? Answer: Yes." All the evidence is to the effect that plaintiff was the sole and absolute owner of the building destroyed, but that he owned only an undivided half interest in the lot upon which the same was situated. It is contended by the insurance company that his ownership of only one-half interest in the lot renders the foregoing statement false, in that he is not the sole owner thereof. We do not think this contention is sound. It will be noted that the question does not ask as to the ownership of the lot, but as to who is the owner of the property insured. The property insured was the building only. The policy does not cover the lot upon which it stands. Plaintiff, according to all the evidence, is the absolute owner of the building, and the answer made by him to the foregoing question was true.[3] * * *

COLLINS v. ST. PAUL FIRE & MARINE INS. CO.

(Supreme Court of Minnesota, 1890. 44 Minn. 440, 46 N. W. 906.)

Appeal by defendant from an order of the District Court for Sibley County, Edson, J., presiding, granting a new trial after verdict directed for defendant, in an action to recover $600 on the policy mentioned in the opinion.

GILFILLAN, C. J. This is an action on a policy of insurance upon a dwelling-house and log barn, and sheds connected therewith, situate on section 31, township 114, range 25. Upon the trial the court be-

[2] The statement of facts as given by the court, and portions of the opinion dealing with the question of proof of loss (printed post, p. 700), and with a point of evidence, are omitted.

[3] It is well settled that a conveyance void as to creditors because executed fraudulently will nevertheless give the grantee such title as will be held valid against the insurer of the property, even though the policy contain a clause requiring sole and unconditional ownership. See Steinmeyer v. Steinmeyer, 64 S. C. 413, 42 S. E. 184, 59 L. R. A. 319, 92 Am. St. Rep. 809 (1902); Rochester Loan & Banking Co. v. Liberty Ins. Co., 44 Neb. 537, 62 N. W. 877, 48 Am. St. Rep. 745 (1895); Groce v. Phœnix Insurance Co., 94 Miss. 201, 48 South. 298, 22 L. R. A. (N. S.) 732 (1909), in which case it was also held that a statute making conveyances between husband and wife void as to "third persons" applied only to such "third person" as would be injured thereby, and did not include the insurer of the property conveyed.

As to the effect of a mortgage on the "sole and unconditional ownership" of the mortgagor, see Union Assurance Soc. v. Nalls, 101 Va. 613, 44 S. E. 896, 99 Am. St. Rep. 923 (1903); 2 Cooley, Briefs on Insurance, 1394.

low directed a verdict for the defendant, and after such verdict, upon plaintiff's motion, granted a new trial, and from the order granting it defendant appeals. On the case made at the trial it was impossible for the plaintiff to recover, for two reasons:

First. The house, barn, and sheds, for a loss upon which a recovery is sought, were not on section 31; but plaintiff claimed at the trial, and gave some evidence tending to show, that it was the intention to insure, by the policy, similar buildings on section 32, and that section 31 was inserted in the policy through mistake. If this were true it would be good cause for reforming the policy by inserting section 32 instead of section 31, but, until so reformed, no recovery could be had for loss to the buildings on section 32.

Second. Even if so reformed, no recovery could be had, for the policy provides that the company shall not be liable "if the interest of the assured in the property is not one of absolute and sole ownership," and it appeared beyond controversy that the plaintiff had only a life-estate in the property. Of course she had an insurable interest, but that interest was not insured. The policy expressly excluded from its operation any interest other than the absolute and sole ownership.

Order reversed.

II. Change of Interest

GIBB et al. v. PHILADELPHIA FIRE INS. CO.

(Supreme Court of Minnesota, 1894. 59 Minn. 267, 61 N. W. 137, 50 Am. St. Rep. 405.)

Canty, J. On February 29, 1892, the plaintiff Gibb was the owner in fee simple of the premises in question, subject to a mortgage of $1,200, held by the plaintiff Hilles. On that day defendant issued a policy of insurance insuring Gibb to the amount of $2,000, for three years from and after that day, against loss by fire to the buildings on the premises, loss, if any, payable to Hilles as her interest may appear; but providing that if, in case of loss, the insurer is not liable to the mortgagor or owner, it shall be subrogated to the rights of the mortgagee under her mortgage, and, upon paying the full amount due on the mortgage, shall receive an assignment of it. This mortgage clause also provided that the policy should not be invalidated as to the mortgagee by any act of the owner, or by any change in the title or ownership of the premises. On February 28, 1893, there was a loss by fire amounting to $1,462.62. The plaintiffs brought this action to recover this loss. The case was tried by the court without a jury, and judgment was ordered in favor of Hilles for $1,200, the

amount of her mortgage, and in favor of Gibb for the balance of said amount of the loss. From the judgment entered thereon, defendant appeals.

The appellant concedes that the plaintiff Hilles is entitled to recover, but contends that a breach occurred, prior to the fire, which avoided the policy as to Gibb; that he is not entitled to recover; and that defendant is entitled, on payment to Hilles of the amount of her mortgage, to be subrogated to her rights under the mortgage. The policy contains the following provisions: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if any change other than by the death of an insured take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise." It is found by the court: That on March 23, 1892, plaintiff made a contract in writing with one Maggie J. Kelly whereby he sold and agreed to convey to her the premises, consisting of five lots, by deed of warranty, on prompt and full performance by her of the agreement, and she agreed to pay therefor the sum of $2,500,—$300 cash, and $1,000 in installments of $50 every 60 days thereafter until paid, the balance to be paid by her in assuming said mortgage,—she to have possession of the premises until default in payment; and in case of such default she agreed to surrender possession on demand, and that the agreement should be void at the option of the vendor. That at and from the time of making the policy of insurance, until the time of making the contract of sale, the buildings had been unoccupied, and that, on the making of said contract of sale, said Kelly entered into the possession of the buildings and premises, and occupied the same until the time of the fire, and made all her payments during that time, and was not in default in any manner upon said contract.

It is contended by appellant that, by the transactions with Kelly, there took place a change in the interest, title, and possession of Gibb, and the condition against any such change was broken, and the policy avoided as to him.[4] It seems to us that there was a breach in the

[4] TRANSFERS BETWEEN PARTNERS.—Much conflict is found as to the effect upon alienation of a transfer of interest between partners. The general rule appears to be that when the transfer is between the partners to whom the policy was issued, so that the moral hazard is not increased by lessening the interest of the insured, or when no new personality is introduced into the contract of insurance, there is no violation of the alienation clause. See Wood v. Insurance Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733 (1896); Virginia Fire & Marine Ins. Co. v. Thomas, 90 Va. 658, 19 S. E. 454 (1894). Where, however, the effect of the transfer is to decrease the value of the insured's holdings, or to introduce another party in interest, the stipulation against change of interest is violated. An instance of the latter situation is shown in the case of Mechanics' & Traders' Insurance Co. v. Davis (Tex. Civ. App.) 167 S. W. 175 (1914). A portion of the court's opinion is as follows: "The policy contained a clause, in substance, to the effect that, unless otherwise provided by agreement indorsed thereon, it should become void in

condition against any change of interest. It is not claimed by respondents that there was any waiver of this condition, and the authorities cited by counsel are nearly all cases where the breach claimed was not of a condition against a change of interest, but a change of title. It is held by the great weight of authority that, where the condition is against any change in the title, there is no breach unless there is a change in the legal title,—that, as long as the insured retains the legal title and an insurable interest in the premises, the policy is not avoided by a transfer of the equitable title or of equitable interests; but we cannot apply this doctrine to a condition against any change of interest. The terms are not synonymous, as contended by counsel. The word "interest" is broader than the word "title," and includes both legal and equitable rights. It is not necessary to consider the question of the change of possession, except so far as it has an influence on the change of interest by strengthening and fortifying the interest acquired by Kelly.

This disposes of the case. The plaintiff Hilles is entitled to judgment for the sum awarded her, but upon payment of the same the defendant is entitled to be subrogated to her rights under her mortgage, and the defendant is entitled to judgment against the plaintiff

the event of any change, other than by death of the insured in the interest, title, or possession of the subject-matter of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured or otherwise. The uncontradicted evidence showed that prior to the fire appellee had sold a two-third interest in his business to G. H. Peters and R. S. Martin, accepting a part of the consideration therefor, and placing the former in charge of his Waco house, of which appellant had no notice or knowledge. We think this sale was in direct violation of the contract of insurance, and defeats appellee's right to recover thereunder. See Insurance Co. v. Ransom (Tex. Civ. App.) 61 S. W. 144 (1901); Assurance Co. v. Bank, 18 Tex. Civ. App. 721, 45 S. W. 737 (1898); Foundry Co. v. Assurance Co., 135 Mich. 467, 98 N. W. 9, 3 Ann. Cas. 707 (1904); Drennen v. Assurance Co. (C. C.) 20 Fed. 657 (1884); Insurance Co. v. Riker, 10 Mich. 279 (1862); Malley v. Insurance Co., 51 Conn. 222 (1883); Osborn v. Insurance Co., 151 Ill. App. 126 (1909); Card v. Insurance Co., 4 Mo. App. 424 (1877); Royal Ins. Co. v. Martin, 192 U. S. 149, 24 Sup. Ct. 247, 48 L. Ed. 385 (1904); Insurance Co. v. Insurance Co., 144 N. Y. 195, 39 N. E. 78, 26 L. R. A. 591, 43 Am. St. Rep. 749 (1894); Bacot v. Insurance Co., 96 Miss. 223, 50 South. 732, Ann. Cas. 1912B, 262 (1909); Robinson v. Insurance Co. (Ky.) 53 S. W. 660 (1899). This was a complete, and not an executory, contract of sale as contended by appellee, nor is it material, as he contends, that he retained a lien to secure part of the purchase money on said property. Assurance Co. v. Bank, supra. The legal title, by reason of the sale, immediately vested in his partners, and they could have enforced the contract as against him. This being true, there was a complete change in the interest, title, and possession of the property. Nor is it material that subsequent to the fire he had a settlement with his partners, by which he paid back to them part of the purchase money received, because after the fire he could do nothing that would defeat appellant's right to insist on a forfeiture on account of such breach of the contract by him. Hence it must be held to have avoided the same under the provisions thereof above quoted."

See, also Maley v. Insurance Co., 51 Conn. 222 (1883); Drennen v. Assurance Corp. (C. C.) 20 Fed. 657 (1884), reversed on other grounds in 113 U. S. 51, 5 Sup. Ct. 341, 28 L. Ed. 919 (1885); Vance on Insurance, 453.

Gibb that he take nothing by this action. The judgment appealed from should be reversed, with directions to enter judgment in conformity with this opinion. So ordered.

GARNER v. MILWAUKEE MECHANICS' INS. CO.

(Supreme Court of Kansas, 1906. 73 Kan. 127, 84 Pac. 717, 4 L. R. A. [N. S.] 654, 117 Am. St. Rep. 460, 9 Ann. Cas. 459.)

GREENE, J.[5] The plaintiff was defeated in an action on an insurance policy, and to reverse the judgment he prosecutes this proceeding.

The policy contained the provision that it shall become void: "If any change other than by the death of the insured takes place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by the voluntary act of the insured, or otherwise." When the insurance was obtained the insured was the owner of the title to the property. Subsequently he entered into the following contract: * * *

[The contract provided that in consideration of the conveyance by one Baker of certain Missouri farm land to the plaintiff, he was to assume a mortgage and convey to Baker the property in question. The delivery of the deed was, however, to be deferred until Baker should repay a certain loan made to him by the plaintiff. By the terms of the contract possession of the premises was to be given to Baker immediately.]

Baker deeded to plaintiff the Missouri lands, which was the full consideration to be paid by him for the insured property. The plaintiff made no conveyance, nor had he delivered possession at the time the property was destroyed by fire, July 29, 1903. The defense was that by this contract a change had taken place in plaintiff's interest in the subject of insurance, which, under the condition quoted, forfeited the policy. Forfeitures are not favored and will never be enforced if by a reasonable interpretation of the agreement and contract of the parties they can be avoided. The provision was intended to protect the company against any increased hazard resulting from a change of interest, title or possession of the insured. An insurance company may contract against such contingency, and if such provision of the contract is violated it would have the right to insist upon being released from liability. The company contracted for the care, supervision, and vigilance of the assured in protecting the property from fire. This is largely its security against loss, and a disposition by the assured of all of his interest, title, or possession in the property, or of

[5] Part of the opinion is omitted.

such a substantial part thereof as would entirely or partially abate this diligence would be a violation of the contract.

The word "interest" as used in the policy is not synonymous with title, it means some right different from title; it cannot mean a greater estate than title, since title as there used was intended to mean the entire estate. It must therefore have been used with the meaning generally attached to it, when used in contradistinction to title as, "any right, in the nature of property, less than title." Anderson's Law Dict. 562. "In the narrower sense it was used in the English common law of real property, to designate a right less than an estate." Century Dict. vol. 4, p. 3142. This we think is the sense in which it was used in the policy. In the interpretation of the policy this word is important. The form of the policy was intended to cover two classes of risks. There are large interests in real estate owned by persons who have neither title nor possession. The form of this policy is adapted to the insurance of such interests, as well as to the insurance of property where the insured is the owner of the title. Where the insured is the owner of only an interest in the estate, the word "interest" used in the forfeiture clause has force, and any change in such interest would forfeit the policy; but where the insured is the owner of the title the word "interest" has no application. In the latter case if any change takes place in the title the policy is forfeited.

The insurance in the present case was procured by one owning the title, as to him only a change in the title would forfeit the policy. We do not feel inclined to follow the decision of Gibb v. Philadelphia Fire Ins. Co., 59 Minn. 267, 61 N. W. 137, 50 Am. St. Rep. 405, because we do not believe that the word "interest" as used in the policy in that case, which was the same as the one we are considering, is broader and inclusive of title; and because in that case it was wholly unnecessary to define "interest." After Gibb had procured the insurance he sold the insured property by a written contract, and gave the purchaser possession, and he remained in possession until the property was destroyed. This of itself was such a violation of the express terms of the policy against change of title, or possession as would render the policy void.

The main contention of defendant in error is that the contract between Davis and Garner for the sale of the insured property, having been fully performed by Davis, is enforceable in equity against Garner, therefore it operated as a present change of interest in the property, within the forfeiture clause of the contract. A party pleading a forfeiture must make it clear that a forfeiture has taken place; he cannot speculate upon what a court of equity would do in a given case, or anticipate its decrees, and upon an assumption that his forecast is correct ask a court to declare a forfeiture. For the purpose of finding grounds for a forfeiture courts of law will not go so far afield as to determine the enforceability of a contract in equity between parties not before it. If, however, this court should believe that spe-

cific performance of that contract could be decreed the relief asked for by defendant would not be granted. It is held that an executory contract to convey insured real estate does not operate as a forfeiture of the policy under a provision that "it should be void if the interest of the insured were otherwise than unconditional and sole ownership" (Arkansas Fire Insurance Co. v. Wilson, 67 Ark. 553, 55 S. W. 933, 48 L. R. A. 510, 77 Am. St. Rep. 129; Franklin Ins. Co. v. Feist, 31 Ind. App. 390, 68 N. E. 188), or where the condition of the policy is that it shall be void, "in case of any sale or transfer, or any change in title or possession" (Browning v. Home Insurance Co., 71 N. Y. 508, 27 Am. Rep. 86), or "if any change * * * take place in the interest, title, or possession of the subject of the insurance" (Erb v. Insurance Co., 98 Iowa, 606, 67 N. W. 583, 40 L. R. A. 845; Home Mut. Ins. Co. v. Tomkies, 96 Tex. 187, 71 S. W. 812, 814).

The judgment is reversed, and the cause remanded. All the Justices concurring.[6]

WOLF v. THERESA VILLAGE MUT. FIRE INS. CO.

(Supreme Court of Wisconsin, 1902. 115 Wis. 402, 91 N. W. 1014.)

CASSODAY, C. J.[7] * * * 2. The more serious question is whether the policy was forfeited by reason of a violation of the other clause of the provision of the policy quoted, to the effect that the entire policy should be void "if any change" should take place "in the interest, title, or possession" of the property, "whether by legal judgment or process or by voluntary act of the insured or otherwise." The answer denies "that the plaintiff owned or had any interest in the buildings or premises mentioned in said complaint at the time of the happening of said loss." That is the particular question litigated upon the trial. The motion for a nonsuit was based upon a supposed change "in the interest, title, or possession" of the property after the making of the contract of insurance, and before the fire. The defendant proved, and the court found, and it is undisputed, that June 28, 1900, some four months prior to the fire, the plaintiff and his wife executed and delivered to the Jos. Schlitz Brewing Company a conveyance of the premises in the form of a warranty deed, which was recorded July 9, 1900. The trial court found that the deed was so given "as security on an open account." It is undisputed that the deed was so given as

[6] The principal case was affirmed in Pomeroy v. Ætna Ins. Co., 86 Kan. 214, 120 Pac. 344, 38 L. R. A. (N. S.) 142, Ann. Cas. 1913C, 170 (1911) where it was held that even the delivery by the insured of a deed in escrow awaiting the fulfillment of conditions precedent, and the possession of the premises by the vendee, was not such a change in the vendor's interest as to avoid his policy.

[7] The statement of facts and a part of the opinion, not relating to the interest of the insured, have been omitted.

security, and that at the time of its delivery the Jos. Schlitz Brewing Company gave back to the plaintiff a writing, of which the following is a copy, omitting the description and signatures: "We hereby acknowledge the receipt of the warranty deed of * * *, which we are to hold as collateral security to guarantee the payment of an account of M. J. Wolf, and we agree to deed back this property upon said M. J. Wolf meeting all his obligations to us." It also appears from the evidence that between the time of the delivery of the deed and the fire the running account was constantly changing, the lowest amount at any time being $1,182.78, and the highest amount being $1,839.45. The trial court held, as a conclusion of law, that the deed from the plaintiff to the Joseph Schlitz Brewing Company "was a mortgage, and did not invalidate" the policy.

The defendant contends that the written agreement of the Brewing Company to hold the deed "as collateral security" for "the payment of an account" of the plaintiff and "to deed back" the property to the plaintiff upon his payment of his account, not being recorded, was improperly received in evidence, and therefore should not be considered as supporting the findings. In support of such contention, counsel rely upon section 2243 of the Revised Statutes of 1898. That section is contained in the chapter entitled "Of Alienation by Deed, and the Proof and Recording of Instruments Affecting Title to Land." It was manifestly intended to protect subsequent bona fide purchasers of real estate for value, as prescribed in the two sections of the statute immediately preceding, against such unrecorded defeasance. In construing a statute, regard is to be had to the purpose of the enactment. Harrington v. Smith, 28 Wis. 43; Wisconsin Industrial School for Girls v. Clark County, 103 Wis. 651, 79 N. W. 422. The defendant was not a purchaser of the premises insured in any sense. If the conveyance avoided the policy, it must be by virtue of a change "in the interest, title, or possession of the" property insured, in violation of the forfeiture clause in the policy. The giving of the deed and taking back the defeasance was nothing more nor less than a mortgage. Did the mere giving of the mortgage constitute such change? This court held several years ago that an execution sale of real estate is in itself no ground of forfeiture under the condition in a policy which provides for the immediate termination of the risk, "if the property be sold or transferred, or any alienation or change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance." Hammel v. Insurance Co., 54 Wis. 72, 11 N. W. 349, 41 Am. Rep. 1. So it has frequently been held that a mortgage upon real estate does not constitute a change in the title or possession of the premises, within the meaning of such a clause in the policy. Insurance Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Insurance Co. v. Walsh, 54 Ill. 164, 5 Am. Rep. 115; Insurance Co. v. Gibe, 162 Ill. 251, 44 N. E. 490; Nease v. Insurance Co., 32 W. Va. 283, 9 S. E. 233; Barry v. Insurance Co., 110 N. Y.

1, 17 N. E. 405; Bank of Glasco v. Springfield Fire & Marine Ins. Co., 5 Kan. App. 388, 49 Pac. 329.

But it is contended that, although the mortgage did not operate to change the title or possession, nevertheless that it did operate to change "the interest" of the plaintiff in the property. At first blush there would seem to be some plausibility in the contention. But it is to be remembered that in this and most of the states a mortgage is a mere lien or security. Slaughter v. Bernards, 97 Wis. 184, 72 N. W. 977; Cumps v. Kiyo, 104 Wis. 656, 80 N. W. 937. In this last case the mortgage consisted of a deed absolute in form with a defeasance back, as here. We are not aware that the precise question here presented has been determined in this court. In Ohio, under a clause in the policy substantially like the one in question, it was held that the giving of a mortgage did not avoid the policy, and that "the words 'title' or 'possession,' as here used, mean an actual change in law and equity, and the word 'interest' means a change in the insurable interest of the owner of the property, neither of which is affected by the execution of a mortgage." Fire Office v. Clark, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562. In that case, as here, the mortgage was in the form of a deed absolute, with a defeasance. So it has been held in Texas that "the execution of a mortgage on the real estate on which the building insured is situated is not a change of interest within the meaning of the condition in a policy declaring the policy forfeited 'if any change other than the death of the insured take place in the interest, title, or possession of the subject of the insurance.'" Lampasas Hotel & Park Co. v. Phœnix Ins. Co. (Tex. Civ. App.) 38 S. W. 361; Same v. Home Ins. Co., 17 Tex. Civ. App. 615, 43 S. W. 1081. It will be observed that the language of the forfeiture clause in the policy in that case was the same as in this. The same is true of the case of Peck v. Insurance Co., 16 Utah, 121, 51 Pac. 255, 67 Am. St. Rep. 600, where the deed was absolute in form, but given to secure the payment of a debt.

We must hold that the giving of the mortgage did not operate to change the "interest, title, or possession" in the property insured, within the meaning of the policy. The judgment of the circuit court is affirmed.

III. Vacancy

HERRMAN v. ADRIATIC FIRE INS. CO.

(Court of Appeals of New York, 1881. 85 N. Y. 162, 39 Am. Rep. 644.)

Action on a policy of fire insurance, providing that the same should be void if the premises should become vacant or unoccupied and so remain for more than thirty days without the consent of the company. The property consisted of a summer residence, with a farm-house and bar on the same premises. In November, as usual, the insured left his country home for the winter, but left a family in the farm-house in charge of the premises. The insured's dwelling-house was aired weekly, and he and his wife visited it every other week, but only for inspection. In April the dwelling-house and some of the outbuildings were burned while the insured was away. There had been no consent to vacancy or unoccupancy obtained.

Folger, C. J. This is an action on a policy of fire insurance. The property insured consisted of different buildings, and different kinds of chattel property kept in those buildings, respectively. The different properties insured, and the different amounts put at risk, each are specifically named in the policy with much minuteness. The property destroyed and for the loss of which the action is brought was but parts of the whole at risk, being the dwelling-house, and most of the contents of it, and four outbuildings, essential or convenient for use with the dwelling.

The question in agitation at the Trial Term and at the General Term was, whether the policy was avoided by a breach of the condition, that if the premises should become vacant or unoccupied, and so remain for more than thirty days without notice to, and consent of, the defendant, in writing, the policy should be void. The plaintiff contends that the two words "vacant" and "unoccupied" are synonyms, and are to be interpreted as having the same meaning, and that the meaning is empty. And then argues that, as the dwelling-house was not empty, there was no breach of the condition. There are doubtless conditions of a dwelling-house, or other like structure, when either word applied to it, or both words applied to it, will express a like state of it. There are however, states of it when that will not be the case. It is so, because the different things that are receptive of the epithets of vacant and unoccupied are different in their capability and susceptibility of being filled or occupied. Some cannot have one of those terms applicable to them, without the other at the same time being also applicable. Some, from the nature of the use which goes with the occupation of them, may not be vacant, and yet they will, in any just use of the term as applicable to them, be unoc-

cupied. A dwelling-house is chiefly designed for the abode of mankind. For the comfort of the dwellers in it, many kinds of chattel property are gathered in it. So that, in the use of it, it is a place of deposit of things inanimate and a place of resort and tarrying of beings animate. With those animate far away from it, but with those inanimate still in it, it would not be vacant, for it would not be empty and void. And as a possible case, with all inanimate things taken out, with those animate still remaining in it, it would not be unoccupied for it would still be used for shelter and repose. And it is because, in our experience for the purpose and use of a dwelling-house, we have come to associate our notion of the occupation of it with the habitual presence and continued abode of human beings within it, that that word applied to a dwelling always raises that conception in the mind. Sometimes, indeed, the use of the word "vacant," as applied to a dwelling, carries the notion that there is no dweller therein; and we should not be sure always to get or convey the idea of an empty house, by the words "vacant dwelling" applied to it. But when the phrase "vacant or unoccupied" is applied to a dwelling-house, plainly there is a purpose—an attempt to give a different statement of the condition thereof; by the first word, as an empty house, by the second word as one in which there is not habitually the presence of human beings. In the case of Herrman v. Merchants' Insurance Company, 81 N. Y. 184, 37 Am. Rep. 488, in this court, in June last, the decision went, not on the ground that the two words were used to mean, or that they meant, the same condition of the building, but that, by the use of the copulative conjunction with them, there was a contract framed of which there was no breach, unless the house was at the same time in the double state expressed by the phrase; that is, both vacant and unoccupied at the time of the fire, both empty and unused for abode.

It is clear, from the testimony, that the dwelling-house insured by the defendant was not occupied as such at the time of the fire. The fortnightly visits of the plaintiff and his wife to it were not the occupation that is meant when a dwelling-house is spoken of. The weekly tours of inspection of the farmer and members of his family living on the grounds, and his supervision of it from his own house, were more useful, but they fell short of being occupation of it. The term "unoccupied," used in the policy, is entitled to a sense adapted to the occasion of its use, and the subject-matter to which it is applied.[8] It does not need that we go into discussion of the good rea-

[8] In Robinson v. Mennonite Mut. Fire Ins. Co., 91 Kan. 850, 139 Pac. 420 (1914), the evidence showed that the previous tenants of the building insured had moved out in March, and that the owner thereupon stored in the house sundry articles of furniture preparatory to occupying the premises in the fall; that while engaged during the daytime in doing work in the fields, he occasionally went into the house to eat his dinner that he had carried with him. The court nevertheless held that the building was not "vacant." Its reasons are as follows: "The court is not disposed to refine upon the terms

sons for exacting the condition on taking a risk upon a dwelling-house. It is enough that the parties have come into that covenant. It is to have a meaning fitted to the circumstances in which it was made and to the subject to which it related. We have already said enough to show our opinion that, for a dwelling-house to be in a state of occupation, there must be in it the presence of human beings as at their customary place of abode, not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage. We think that a verdict of a jury would not have been allowed to stand, that found that this dwelling-house was occupied at the time of the fire, within the terms of the policy.

But it is said, that though this may be so in general, yet that the defendant made its contract with a view to just the state of things that existed with this property; that it was chargeable with a knowledge of the character and use of the premises, and that there would be a change of occupancy, such as in fact occurred. We cannot yield to that view. It may be that the defendant knew that it was but the place of summer abode for the plaintiff. Its contract was issued in the summer when the property was in strict occupancy, and it provided for the coming of the fall, when that occupancy would be abandoned or modified; for the policy was not void at once on a cessation of occupancy. That cessation must last for thirty days, and be unnotified to the defendants and continue thereafter without his consent. There was opportunity for the plaintiff to keep up that indemnity or to get other; and to the defendant to retain the risk, or to be freed from it, when that occupancy was about to cease, and notice was given.

Nor are we able, after much consideration, to agree with the learned General Term on the ground upon which it put its judgment. The condition of the policy is: "Or if the above-mentioned premises shall * * * become vacant or unoccupied * * * this policy shall be void." As we have above said, there were several different kinds and pieces of property insured, and, as was indicated by the description of them, the whole making up a well-to-do proprietor's rural establishment. The understanding must have been that there was comprised in the whole the buildings on a farm or county seat and the chattel property usually kept at such a place. The contention is that the words "above-mentioned premises" are collective and apply to all

'vacant' and 'unoccupied.' Of course, they are distinct words having distinct meanings, but as applied to the subject under consideration it adds nothing to the thought to say that a house is 'vacant and unoccupied.' Care and attention such as will naturally result in protection against the hazard covered by the policy is the matter in mind. This may exist although contrary to the defendant's contention, a building may not be actually occupied as a present place of abode. Without this a building may be vacant although, contrary to the plaintiff's contention, it may be far from being empty of everything but air. In this case the premises were occupied by the owner for substantially all the purposes of a dwelling place except that sleeping there at night was deferred and meals were eaten there only occasionally."

the property described, and the intent of the condition is that if all of it should be left unoccupied, then the policy would be void; but that one or several, or many of the buildings might be unoccupied, yet, if the rest were occupied, the condition of the policy would be saved. To give this construction to the phrase in question, it would need to carry it through all the conditions in the policy, to manifest absurdity and to an inconvenient precedent. There is a condition against other insurance, "on the property hereby insured." If the plaintiff had over-insured his dwelling-house, would not the condition have been broken, as to that, though he had not increased that on his kitchen detached? There is a condition against a change of title of the property. If the plaintiff had sold off so many acres as would include the farmhouse, would he have retained his insurance on that building because he had not transferred the whole premises?

The plaintiff grasps at a two-edged sword, when he seeks to make such application of those general words of the policy. He contends that when words are used in the policy referring back to the property described, they mean to include the whole property. This would be to make the contract of insurance entire and indivisible; and to affect all the property insured with any act of the insured, which, as to any item thereof, worked a breach of any condition. This is not the true, just, or equitable construction. The clause is not to be used distributively, and to be applied to each singular of the previous description of the property, as the kind of that property and the nature of the use of it may demand. It was upon this principle that we grounded our decision in Merrill v. Agr. Ins. Co., 73 N. Y. 452, 29 Am. Rep. 184. There we said: "Though there may have been some conduct of the insured as to some of the property, not evil in itself, but working a breach of the condition in its letter, the effect of that breach may be confined to the insurance upon that property, the contract as to that be held to be avoided, and as to the other subjects held valid." This was the converse of the proposition that we are now maintaining. The case of Bryan v. Peabody Ins. Co., 8 W. Va. 605, is not parallel with this. Therefore, though the farm premises and some of the buildings thereon were in actual human occupation, that use of them did not extend to and take in the dwellings burned, so as to keep good the condition of the policy.

It is further claimed that it was erroneous for the trial court to direct a verdict for the defendant, because all the property burned was not unoccupied. Besides, the dwelling-house, there was lost a wash-house, a wood-house, a kitchen and a privy. It is contended that there was no evidence that these were unoccupied. The reasoning is ingenious, but it is not convincing. It is said that it does not appear that the occupation of these structures was confined to the plaintiff or the members of his immediate family as it was made up when he dwelt upon the place, and that it might be that the farmer and the members of his family might have used and occupied them. Now,

these out-buildings were appurtenant to the dwelling-house; the use of them was concurrent with the use of the dwelling-house; they were parts of the one domestic establishment, and separate but forty feet from the main building. It is too plain for denial, save as a dernier resort, that the occupancy of them, in habitual continuous use for the purposes for which they were built and to which they were put, began when that of the dwelling-house began, and ended when that ended. The plaintiff and the defendant made their contract in such terms as it pleased them both. It may or may not be a strict and rigorous application to the facts of the case of the condition that we have been considering; but we cannot, consistently with lasting principles of construction and interpretation, hold otherwise than that the plaintiff made a breach of a binding condition, and must abide the unfortunate consequence.

The order of the General Term should be reversed, and judgment absolute rendered in favor of the defendant upon the verdict, with costs. All concur except MILLER, J., not voting.

Order reversed and judgment accordingly.

FARMERS' MUTUAL EQUITY INS. SOCIETY v. SMITH.

(Court of Appeals of Kentucky, 1914. 158 Ky. 459, 165 S. W. 675.)

Appeal from Circuit Court, Henderson County.

CLAY, C. Plaintiff, Herbert Smith, was the owner of a frame dwelling house which was insured by defendant, Farmers' Mutual Equity Insurance Society, for the sum of $300. The policy, which was to continue for a period of five years, contained the following provision: "Insurance will not be carried upon unoccupied buildings unless covered by a vacancy permit, which will be granted only on the written application filed with the secretary for a period of thirty days, with privilege of one renewal. The amount of the insurance shall be reduced one-half during said vacancy." The house was occupied by a tenant, who moved out on Saturday evening, April 19, 1913. Another tenant was to take possession on the following Monday, April 21st, but was prevented from doing so by the destruction of the property by fire, which occurred the same morning. Having refused to pay the insurance, plaintiff brought this action against the defendant to recover on the policy. The company defended on the ground of nonoccupancy, in violation of the contract. This defense was held insufficient, and judgment was rendered in favor of plaintiff. Defendant appeals.

In construing exceptions, warranties, and conditions in policies of insurance, it is generally held that the language, being that of the insurer, selected by him and intended for his benefit, must be clear and unambiguous, and if of doubtful meaning, the doubt will be re-

solved in favor of the insured. The purpose of such conditions in a policy is to restrict the insurer's obligation, and, if the meaning is not clear, it is his fault in not making use of more definite terms in which to express it. Chandler v. St. Paul, etc., Ins. Co., 21 Minn. 85, 18 Am. Rep. 385; U. S. Mutual v. Newman, 84 Va. 52, 3 S. E. 805; Olson v. St. Paul, etc., Ins. Co., 35 Minn. 437, 29 N. W. 125, 59 Am. Rep. 333. In determining the effect of a provision of a policy avoiding the insurance if the premises become vacant or unoccupied, it is generally held that the intention of the parties will control, and that such intention will be ascertained from the whole instrument, the subject-matter of the contract, and the situation of the property insured. Stout v. City Fire Ins. Co., 12 Iowa, 371, 79 Am. Dec. 539; Georgia Home Ins. Co. v. Kinnier, 28 Grat. (Va.) 88.

Perhaps the most important consideration in passing on a question of forfeiture for vacancy or nonoccupancy is the use which, under the policy, may be made of the premises insured. Where it is occupied by the owner as a residence, it cannot be said to be within the contemplation of the parties to the contract that the premises shall never become vacant or unoccupied, even for a very brief period of time. The company knows that the owner will sometimes be away on a visit, or be temporarily absent for some necessary purpose. So, too, where the property is occupied by a tenant, it must necessarily be within the contemplation of the parties to the contract that occasionally it will be vacant for a short and reasonable interval of time between the outgoing of one tenant and the incoming of another. While there is a lack of uniformity in the decisions on the question, and many of the courts hold that a forfeiture is incurred even in case of the temporary absence of the owner, or a short period of time between the exchange of tenants, yet many of the courts hold that, under the circumstances above set forth, a forfeiture will not be adjudged.

Thus in the case of Franklin Fire Ins. Co. v. Kepler, 95 Pa. 492, the absence of the insured from his dwelling from Wednesday until Monday to attend a funeral was held not to be a breach of the provision of the policy against vacancy and unoccupancy. In the case of Eddy v. Hawkeye Ins. Co., 70 Iowa, 472, 30 N. W. 808, 59 Am. Rep. 444, the tenant moved out on Tuesday. On Wednesday the owner took possession and commenced cleaning the house, intending to occupy it with his family on Saturday. On Friday night the house burned down. It was held that the house was not vacant. In Shackelton v. Sun Fire Office of London, England, 55 Mich. 288, 21 N. W. 343, 54 Am. Rep. 379, the house was occupied by a tenant. The tenant moved out, and the landlord at once moved his own goods in and began to clean up, with the intention of occupying the house himself. Next day he went away for three days' absence. While cleaning the

house he ate and slept at a neighboring house, and after a few days went off on a business trip. While gone the house was burned. It was held that the policy had not become void on the ground of vacancy. In the case of Laselle v. Ins. Co., 43 N. J. Law, 468, the policy provided that it should become void "if the dwelling house should become vacant and unoccupied and so remained." It was held that the mere absence of the tenant, who was then occupying the building as a dwelling house, on the night of the fire did not leave the building vacant or unoccupied within the sense of the contract. In Moody v. Ins. Co., 52 Ohio St. 12, 38 N. E. 1011, 26 L. R. A. 313, 49 Am. St. Rep. 699, it was held that a continuous use of the dwelling house was not necessary to constitute occupancy within the meaning of the fire insurance policy, but that the family might be absent for health, pleasure, business, or convenience for reasonable periods. In Doud v. Citizens' Ins. Co., 141 Pa. 47, 21 Atl. 505, 23 Am. St. Rep. 263, it was held, under a policy of insurance on leased premises, containing a clause avoiding the policy if the premises should become vacant without the written consent of the insurer, that a reasonable time should be allowed to carry out a change of tenants without imposing upon the insured the penalty of either an intended or permitted vacation of the premises. The same rule was followed by our Superior Court in the case of Dwelling House Ins. Co. v. Walsh, 10 Ky. Law Rep. 282.

Other authorities might be added, but those cited are sufficient to establish the rule that is clearly applicable under the facts of this case. Here the tenant vacated the house on Saturday evening. Another tenant was to move in on the following Monday. Early Monday morning the house was burned. The interval of time incident to the change of tenants was not only not unreasonable, but such as the parties to the contract must have contemplated would necessarily take place.

Judgment affirmed.

IV. Increase of Risk

KYTE v. COMMERCIAL UNION ASSUR. CO.

(Supreme Court of Massachusetts, 1889. 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508.)

Action on two policies of fire insurance in the Massachusetts standard form. The defendants answered that the policies had been avoided by an increase of risk. It appeared that for some time the insured had used the premises for the illegal sale of liquor, but that before the fire a license to sell the same had been secured.[9]

[9] The statement of facts is much abbreviated.

C. ALLEN, J. These policies were in the form of the Massachusetts Standard policy, and each provided that "This policy shall be void * * * if, without such assent [namely the assent in writing or in print of the company], the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risks, * * * or if gunpowder or other article subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law." Various other circumstances were enumerated which would also avoid the policy. At the beginning of the trial, the defendant waived every defence except increase of risk. The defence of the illegal keeping of intoxicated liquors, as a separate and distinct defence, was therefore waived.

We have to consider, in the first place, whether the instructions requested by the defendant were given in substance. The plaintiff contends that they were. The learned judge before whom the case was tried adopted in substance the third and fifth instructions asked for by the defendant, and thus instructed the jury, that if they should find that during the time for which these policies were issued the plaintiff Kyte, by obtaining a victualler's license and making use of this building under said license, and legally or illegally selling intoxicating liquors therein, increased the risk, then this policy became void as to the plaintiff Kyte, and he should not recover for his interest therein; and if they should find that while these policies were in force intoxicating liquors were kept and sold in this building by the plaintiff Kyte, or with his consent or knowledge, and that thereby the risk was increased, this policy became void as to his interest, and he could not recover. This was a general and broad instruction, including the increase of risk by using the premises as a common victualling place, or as a place for selling intoxicating liquors legally or illegally, and well covered the general question of the effect of an increase of risk. From this instruction, taken alone, a jury might well have inferred that the policy would be void in case of any such increase of risk at any time during the time covered by the policies and before the fire.

But the defendant, in the fourth request for instructions, asked for a special instruction, adapted to the case of a temporary increase of risk which had ceased before the time of the fire; that is to say, that if the jury should find that, by the illegal sale of intoxicating liquors in this building by the plaintiff Kyte, or by others with his consent and knowledge, for a certain portion of the time for which these policies were issued, the risk was for that period increased, this policy would be void as to Kyte's interest, and he could not recover, although this increase was not permanent. The judge declined to give this ruling, and instructed the jury, in substance, that if that illegal use was temporary, not contemplated at the time when the policy was

taken by the plaintiff, and ceased before the fire, then the fact that he had made an illegal use of the premises in 1882, which was during the time covered by the policy, would not deprive the plaintiff of the right to maintain the action; and that his right under the policy, if suspended while the illegal use of the building continued, would revive when he ceased to use it illegally. This instruction did not in express terms mention the subject of an increase of risk by the illegal use of the premises for selling liquor; but the instruction was given in the place of the fourth request for instructions, and that request was refused, the judge saying that he had given what would be entirely inconsistent with it. The question is thus presented whether the provision of the policy that it shall be void in case of an increase of risk means that it shall be void only during the time while the increase of risk may last, and may revive again upon the termination of the increase of risk. The provision is that the policy shall be void if any one of several circumstances successively enumerated shall be found to exist. Some of these circumstances relate to the time of issuing the policy, and others could not arise till afterwards. They are of different degrees of importance, some of them going to the essential matters of the contract, and others being comparatively trivial in character. The language of the policy is the same in respect to them all, that the policy shall be void.

In Hinckley v. Germania Ins. Co., 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445, the policy was in the same form as those in the present cases, and for a short time during the term of the policy the plaintiff kept a bowling alley and billiard table without having any license therefor. There was no question of increase of risk, or other actual prejudice to the insurer; and under these circumstances two questions arose: first, whether the plaintiff's act fell within the provisions that the policy should be void if gunpowder or other articles subject to legal restrictions should be kept in a manner different from that allowed by law; and secondly, whether, assuming that the policy would be void during the time of the illegal keeping of the bowling alley and billiard table, it would revive after such temporary use had ceased. In deciding the case, the court intimated that the plaintiff's act was not within the meaning of the provision in the policy, unless the risk was thereby increased, but placed the decision upon the second ground, that the policy would revive. The court now thinks it would have been better to place the decision of this part of the case solely upon the first ground, leaving it an open question whether a departure from the terms of the provision of the policy, without an increase of risk, may be deemed merely to suspend, and not absolutely to avoid the policy. However that may be, we think an increase of risk entitles the insurer to avoid the policy absolutely. The contract of insurance depends essentially upon an adjustment of the premium to the risk assumed. If the assured by his voluntary act increases the

risk, and the fact is not known, the result is that he gets an insurance for which he has not paid. In its effect upon the company, it is not much different from a misrepresentation of the condition of the property.

If the provision stood alone, that in case of any material misrepresentation as to the risk or any voluntary increase of risk afterwards the policy should be void, it could hardly be doubted that the words should be taken in their natural, obvious meaning. The fact that with this are coupled the other provisions above referred to, does not change its meaning with reference to the effect and consequence of an increase of risk. An increase of risk which is substantial, and which is continued for a considerable period of time, is a direct and certain injury to the insurer, and changes the basis upon which the contract of insurance rests; and since there is a provision that, in case of an increase of risk which is consented to or known by the assured, and not disclosed and the assent of the insurer obtained, the policy shall be void, we do not feel at liberty to qualify the meaning of these words by holding that the policy is only suspended during the continuance of such increase of risk. Lyman v. State Ins. Co., 14 Allen, 329; Mead v. Northwestern Ins. Co., 7 N. Y. 530.

It follows, therefore, that the fourth instruction which was requested, or something in substance like it, should have been given. Upon the facts stated and assumed, the increase of risk, if there was one, continued for fifteen months, and could not be treated as a casual, inadvertent, or inevitable thing. Exceptions sustained.

V. Prohibited Articles

HARPER v. NEW YORK CITY INS. CO.

(Court of Appeals of New York, 1860. 22 N. Y. 441.)

Appeal from a judgment of the Superior Court of the City of New York in favor of the plaintiff.

The policy issued by defendant upon plaintiffs' printing and book materials, stock, etc., contained in a building "privileged for a printing-office, bindery and book-store," provided that if camphene were used, and a loss was occasioned thereby, the insurer would not be liable. The jury found that the use of camphene for cleaning ink rollers, etc., was according to a general and established usage in the printing and book business as carried on by the plaintiffs, and that such use was necessary in that business. A loss was caused by a lighted match thrown into a pan, on the floor, containing camphene.[10]

[10] The statement of facts is abbreviated.

COMSTOCK, C. J. The jury found, in answer to interrogatories specially submitted to them, that the use of camphene in the manner proved was according to a general and established usage in the printing and book business as carried on by the plaintiffs, and that such use was necessary in that business. In the written part of the policy, the subject of insurance is described as the plaintiffs' printing and book materials, stock, etc., "privileged for a printing office, bindery," etc. The language is identical with that contained in the policy which was before us in the case of Harper v. Albany Insurance Co., 17 N. Y. 194. We there held, for reasons which need not be repeated, that the insurers were liable for loss occasioned by the necessary and customary use of camphene in the plaintiffs' business, although the use of that article was prohibited, in general terms, in the printed conditions annexed to and forming a part of the contract. In that case, the printed form of the policy, if construed without reference to the subject of insurance as described in the written part, prescribed the use or presence of camphene for any purpose. In this case, the printed condition declares, in substance, that if the article is used, and a loss is occasioned thereby, the insurer will not be liable. There is no other distinction between the two cases.

And this distinction is not one of principle. In the case cited, we found no irreconcilable repugnancy between the written and printed clauses of the contract. If such a repugnancy had been discovered, then, as the court said, the printed form must yield to the more careful and deliberate written language of the parties in describing the subject of insurance, at the very moment when the policy was issued. But it was considered, that each clause might take effect; by insuring the plaintiffs' stock, with the privilege of a printing-office and bookbindery, the use of such materials, including camphene, as were necessary in that business was allowed; otherwise, the contract was a mere delusion. But the restraining clause might, nevertheless, have its full effect upon the use of camphene for the purposes of light, and for all purposes beyond its necessary connection with the stock and business insured. So, in this case, camphene must be considered as a part of the stock insured; its continued presence and use were allowed, because the business which required its use was expressly privileged. The printed condition, exempting the underwriters from loss when occasioned by this article, should therefore be construed as referring to uses not within the privilege thus granted; otherwise, the two parts of the contract are repugnant to each other, and the printed form must yield to the deliberate written expression. An insurance upon the plaintiffs' stock and business, to be of no effect if a loss should be occasioned by the combustion of an article constituting a part of that stock, and necessarily used in the business, would, I think, be an anomalous undertaking. Undoubtedly, such a contract might be made: a policy can be so framed as to allow the presence of a dangerous article, and even so as to insure its value, while at the same time it

might exempt the insurer from loss, if occasioned by the presence or use of the article; but I think it would need very great precision of language to express such an intention. Where camphene or any hazardous fluid is insured, and its use is plainly admitted, the dangers arising from that source are so obviously within the risk undertaken, that effect should be given to the policy accordingly, unless a different intention is very plainly declared. And such an intention, instead of being hid away in printed forms, remote from the principal contract, ought to be found in the deliberate expressions which are made use of at the time when the contract is entered into.

Without doubt, all the printed conditions and specifications annexed to a policy are, or at least may be, a part of it. But they relate to insurance in general, as practiced by the underwriter; and upon, or within, those forms, the parties to each policy actually issued write their own particular intention. The plain meaning of the written part should, therefore, prevail, and other clauses must yield, if repugnant, or they must be construed so as to avoid a conflict of intention. In this case, I think the perils of keeping and using camphene were insured against, so far as the keeping or use of it was permitted at all, and that the clause which exempts the insurer from liability should be understood as applying to the presence of the article under other conditions. The judgment should be affirmed.

SELDEN, J. (dissenting). Contracts which belong to an extensive class, such as charter-parties, policies of insurance, etc., where all are in their main features identical, are usually reduced to a prescribed formula, embracing those general provisions which are applicable to most cases of the class, and then printed, leaving blank spaces to be filled up in writing, so as to adapt the contract to the particular case. In construing such contracts, if there is any repugnancy between the written and the printed portions, the latter is to be modified and controlled by the former. In other words, those general provisions which were framed for the class at large must yield to such as are more specific, and designed for the particular case.

This rule, which was applied in Harper v. Albany Mutual Insurance Co., 17 N. Y. 194, and Bryant v. Poughkeepsie Mutual Insurance Co., id. 200, is equally applicable here. That portion of the printed conditions incorporated into the policy which related to the various articles and kinds of business denominated hazardous and extra hazardous, and those which are subjected to special rates of insurance, virtually prohibited the use of camphene upon the insured premises. But the written portion insured the plaintiffs upon their printing-office, bindery, and book-store, and upon the materials, stock, and machinery therein; and as it appeared that camphene constituted a necessary portion of such stock, and was essential to the carrying on of the business insured, its use was clearly authorized by this clause of the policy. There was, therefore, a direct conflict between the general provisions contained in the printed conditions of the policy and the written de-

scription of the particular subject of insurance; and, of course, the latter must prevail. The use of camphene, therefore, was authorized, and it was itself insured as a part of the plaintiffs' stock.

Thus far there is no controversy between the parties, but the contest arises under another clause of the policy. The eighth condition provides, that the company "will not be liable for loss or damage caused by lightning, except that which results from fire that may ensue therefrom; nor for any loss, either by fire or otherwise, occasioned by the explosion of a steam-boiler, or occasioned by camphene or other inflammable liquid, or by the explosion of gunpowder." The position of the defendants is, that the loss, as shown by the proofs, was "occasioned by camphene," and hence they are not responsible. It becomes necessary, therefore, to put a construction upon that condition of the policy which I have just recited.

The counsel for the plaintiffs contends that this provision was only intended to exempt the company from liability for any loss which should be occasioned by camphene "in a relation or use outside of the description and privilege" contained in the policy. But there are serious difficulties in the way of such a construction; it is an entire departure from the language of the provision, which is broad and general, embracing every loss which should be in any way occasioned by camphene. To make this interpretation compatible at all with the terms of the provision, it is necessary to interpolate a clause more extensive than the entire provision as it stands. The policy says the insurers will not be liable for any loss "occasioned by camphene." This is said to mean, that they will not be liable for such a loss, provided the camphene which caused the loss was outside the insured premises, or was used upon such premises in a manner not authorized by the policy. I know of no rule for the interpretation of contracts which warrants so extensive an interpolation; it would make a contract widely different from that which would result from the terms used by the parties themselves.

The argument in favor of this interpretation is, that, by force of the rule that the written is to prevail over the printed portion of the policy, the defendants have not only authorized the use of camphene by the plaintiffs for certain purposes, but have consented to include camphene itself as a part of the plaintiffs' stock, among the articles insured; and that it cannot be supposed that they intended to exempt themselves from liability for a loss which should be occasioned by one of the insured articles, and which was upon the premises under the precise circumstances authorized by the policy.

The incongruity suggested by this argument is hardly sufficient to prevent our construing this contract as the parties have made it. What repugnance is there between the provision which authorizes the use of camphene in the business of the insured, and that which exempts the company from liability for a loss "occasioned by camphene"? I can see none whatever. By the written portion of the policy, the in-

surers assumed a responsibility in regard to the use of camphene, from which they were entirely exempted by the printed conditions relating to hazardous and extra-hazardous business; the eighth condition comes in as a modification of this responsibility. It operates as a division and mutual distribution between the insurers and the assured of the risks resulting from the use of this hazardous article. By the two provisions combined, the insurers say to the assured, "we will agree that the mere presence of camphene upon the insured premises, or its use there in your business, shall not vitiate the policy; but if it shall be the actual primary cause of any loss, we will not be held responsible." Such an arrangement is not open to any legal objection, but one which the parties had a perfect right to make, and which seems to me not unnatural. It does not cast the entire risk upon either of the parties, but divides it between them. If a fire occurs from some other cause, and, in consequence of the presence of camphene upon the premises, it is aggravated and made more destructive than it otherwise would have been, the loss falls upon the insurers. If a fire is occasioned by the camphene, and the insurers are not able to trace it to that cause, the loss falls upon them. It is only in those cases where the insurers are able to show that camphene was the original cause of the loss, that the risk is assumed by the assured. I see nothing, either in law or in reason, against the making of such a contract; and that is precisely the contract which these parties have made, if we interpret their language according to its natural import. * * *[11]

DENIO and CLERKE, JJ., also dissented.

Judgment affirmed.[12]

[11] The remainder of the dissenting opinion dealt with the plaintiff's contention that the loss was not "occasioned by camphene," but by the match that was thrown into the camphene. The learned justice did not think it sound.

[12] See, in accord, Steinbach v. La Fayette Fire Insurance Co., 54 N. Y. 92 (1873). In this case insurance was placed upon a stock of goods of a German jobber and importer, with special permission to keep firecrackers. "Fireworks" were among a class of articles prohibited by the policy as specially hazardous, but nevertheless the insured was allowed a recovery on the policy for a loss resulting from the fireworks, upon showing that they were a part of his customary stock in trade. The United States Supreme Court, however, in Steinbach v. Insurance Co., 13 Wall. 183, 20 L. Ed. 615 (1871), on a similar policy and on the same facts, reached an opposite conclusion, holding that the custom of such jobbers to keep fireworks as a part of their stock in trade could not prevail against the express prohibitions of the policy.

VI. Other Insurance

KELLEY v. PEOPLE'S NAT. FIRE INS. CO.

(Supreme Court of Illinois, 1914. 262 Ill. 158, 104 N. E. 188.)

Cartwright, J. The People's National Fire Insurance Company issued its policy of insurance to Emma Kelley, insuring against loss or damage by fire to the amount of $2,000 on her house, and $1,000 upon the household furnishings of the same. The house was burned and the personal property burned or damaged, and suit was brought in the circuit court of McLean county upon the policy for the use of her trustee in bankruptcy. Judgment was rendered on the verdict for a jury against the insurance company for $2,300, and, the Appellate Court having affirmed the judgment [181 Ill. App. 142], we granted a writ of certiorari to bring the record to this court.

The policy contained provisions that it should be void (1) if the insured should make or procure any other contract of insurance; (2) if with the knowledge of the insured foreclosure proceedings should be commenced; (3) if the interest of the insured was other than unconditional and sole ownership; (4) if any change should take place in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or by voluntary act of the insured or otherwise, and there were pleas alleging facts which would render the policy void under these provisions. There was also a condition that the insurance company should not be liable for a greater proportion of any loss than the amount of this policy should bear to the whole insurance on the property, and it was alleged that the plaintiff had procured other insurance.

When Emma Kelley insured the property, she informed the agent that it was incumbered by two mortgages made to the same party, amounting to $600, and his report to the insurance company showed that fact. The mortgages required her to insure the property for the benefit of the mortgagee to the extent of his interest, and, upon her failure to do so, he was authorized to procure insurance. The policy was left with the insurance agent, and she never saw it, but understood that she had complied with her agreement. She did not procure any other insurance, but the mortgagee obtained a policy without her knowledge or consent. When she learned of it, she sent notice to the mortgagee informing him of the insurance previously placed by her, and he promised to cancel the policy he had procured, but did not do so. After the fire, the adjuster of the other corporation said that his company was willing to pay, but she had refused to recognize that policy and never authorized it. The mortgage authorized the mortgagee to procure insurance only in the event that she failed to do so,

and, as she understood it, she had already complied with her agreement. The condition was not violated by the unauthorized act of the mortgagee, and, as he had agreed to cancel the policy procured by him, she ought not to forfeit her insurance. That being so, the provision limiting the liability of the insurance company to her to a proportionate share of the loss was not applicable to the facts.[13] * * *

Emma Kelley was the sole and absolute owner of the premises when the policy was issued, and there was no misrepresentation as to the title but several judgments were recovered against her prior to the fire, and it is contended that the judgment creditors thereby acquired an interest in her property which rendered the policy void. An interest or title to property means a legal interest, and no person has an interest in the property of another simply because he has a judgment under which he may acquire a title, if the judgment is not paid or the property redeemed from a sale under it. The recovery of a judgment does not effect a change in an interest in or title to property, but an interest is acquired only when there has been a sale under an execution, and the title is changed only when there has been a failure to redeem and a conveyance.

Complaint is made that the court refused to admit in evidence an assessor's schedule giving a valuation of the household goods for the year 1911, and it is argued that the schedule was admissible on the question of value. Emma Kelley did not make any return of her property for assessment that year, and the schedule was not made by her or her husband and appears to have been made by the assessor. There is a conflict of authority whether a return for taxation made by the owner is admissible in evidence as tending to show the value of property (Sanitary District v. Pittsburg, Ft. Wayne & Chicago Railway Co., 216 Ill. 575, 75 N. E. 248), and this court has not had occasion to settle that question, but there is no doubt that a return is not admissible against an owner when not made by him or his agent. The court did not err in that ruling.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

FUNKE v. INSURANCE CO.

(Supreme Court of Minnesota, 1882. 29 Minn. 347, 13 N. W. 164, 43 Am. Rep. 216.)

DICKINSON, J. This action is to recover upon a policy of insurance issued by the defendant in June, 1874, whereby the defendant insured the dwelling-house and furniture of the plaintiff against loss by fire for a period of seven years. The fire causing the injury complained

[13] In the portion of the opinion omitted the court held that the failure of the insurer to cancel the policy upon learning that foreclosure proceedings had been instituted constituted a waiver of the right to avoid the policy on that account.

of occurred in March, 1880. The policy contained these conditions: "If the insured shall have, or shall hereafter make, any insurance in any other company on the property hereby insured, or any part thereof, without obtaining the consent of the secretary of this association, * * * the insured shall not be entitled to recover from the association any loss or damage which may occur in or to the property hereby insured, or any part or portion thereof." In February, 1879, while this policy was still in force, the plaintiff made application to the American Insurance Company of Illinois for insurance upon the same property, representing in such application that he had no other insurance upon it. Thereupon, and upon a sufficient consideration, the latter company issued its policy of insurance upon said property for the period of five years, which policy was, however, by its terms rendered "void" by reason of the prior and undisclosed contract of insurance with this defendant, although upon its face it was a valid contract of insurance. The plaintiff held the policy of the American Insurance Company, and after the loss in March, 1880, made proofs of loss, and claimed payment from that company. The company, however, learned of the prior insurance with this defendant, refused to pay, denying its obligation. No notice was given to the defendant of the subsequent insurance in the American Insurance Company. The court below considered that the plaintiff had not been guilty of actual fraud in the premises, and, upon the facts here briefly stated, plaintiff was held entitled to recover.

The liability of the defendant depends upon the proper legal construction of the written contract of insurance. In the policy is expressed the agreement of the parties, in terms which must be regarded as having been deliberately chosen by themselves, and which we must presume they both understood and consented to. If the condition respecting other insurance was violated, not in its letter, but within the intent and meaning of the parties, by the making of a subsequent contract of insurance, valid upon its face, but void or voidable, in fact, by reason of misrepresentation (not actually fraudulent) on the part of the assured, then the liability of the defendant was terminated. Otherwise it was not. We have, then, to consider the meaning and force of that stipulation in the contract.

The courts have often been called upon to construe similar provisions in the policies of insurance, and, in the American courts, it has generally been held that policies containing conditions similar to that in this case were not avoided by the making of other contracts of insurance which were in fact void or voidable by reason of the breach of some condition therein, or by reason of misrepresentation. These decisions proceed upon a construction of the contract which makes the condition against other insurance to mean only other valid insurance, or a valid and enforceable contract of insurance; and hence it is held that other contracts of insurance, void or voidable at the election of the insurer, by reason of the breach of some condition therein, or even,

as some of the Courts hold, by reason of the actual fraud of the insured, are not within the condition construed, and do not operate to avoid the policy.

We cannot yield assent to such a construction of the contract. It involves, in our judgment, a disregard of the plain objects contemplated by the parties to the contract when it was made, and to accomplish which the condition against other insurance was adopted. It is a matter of common knowledge, which we may not ignore in construing this contract, that it is a settled policy of insurers against loss by fire to protect themselves against incendiarism and negligence, by compelling the insured to bear some part of the risk, so that, if the property shall be destroyed, he will suffer loss, notwithstanding his insurance. To this end the insurer limits the amount of his own insurance upon the property to a sum less than its value, and guards against other insurance being effected upon the same property, without his consent, by stipulations to that effect, which are ordinarily, as in this case, embodied in the written contract of insurance. Such provisions are for the benefit of the insurer, and can have no other object or purpose than to place the insured in such a position respecting the property that, from considerations of self-interest, he not only will not willfully burn it, but will be watchful and careful in guarding against fire.

In the case before us it distinctly appears that what we have spoken of as a custom in the business of insurance was not departed from. The policy provided that the insured shall not be entitled to recover more than two-thirds of the value of the property at the time when loss should occur, and that any misrepresentation or over-valuation in the application should avoid the policy; and, in the same connection, is the condition respecting other insurance, already quoted. It has never been claimed, to our knowledge, that the object of incorporating in contracts of insurance conditions like that under consideration was, or could possibly have been, other than that which is above indicated. Considering now the purpose sought to be accomplished by this condition, and which, if we have interpreted it aright, both the parties must be regarded as having understood as we understand it, the conclusion is unavoidable that in making a subsequent contract of insurance, for the purpose of securing other or further indemnity in case of loss by fire, the plaintiff did that which, by the terms of the contract, avoided it, although he could not enforce a recovery upon such subsequent contract.

We assume that the plaintiff intended to secure indemnity by the second insurance. It is not consistent with human conduct that he should have paid a premium and incurred legal obligations knowing that he secured no right and no possibility of benefit in return. So far as concerned his conduct in the care or destruction of the property, it was not important in a legal sense whether in fact the second contract was enforceable by him or not. By the very means contem-

plated by the parties and referred to in the contract—that is, by contracting for other indemnity in case of loss by fire—he had removed from his mind all motives of self-interest in the preservation of the property, so far as "other insurance" could have that effect. Whatever increased hazard "other insurance" could cause, was effected, to the full extent, if, in fact, plaintiff supposed the second insurance valid and enforceable; and in a less degree, perhaps, if he knew it to be void at the election of the insurer, and that he could not recover upon it if the facts avoiding it should be discovered. In either event, that purpose which the parties to this contract contemplated, and deemed so important that they made express conditions respecting it, was defeated.

In the decisions which we have above referred to, it has been considered that a non-enforceable contract for "other insurance" is not a breach of the condition, because, in fact, it is not insurance. The Supreme Court of New Hampshire expresses the idea in these words: "There is an intrinsic absurdity in holding that to be an insurance by which a party is bound to make good another's loss only in case he pleases to do it:" Gale v. Belknap County Ins. Co., 41 N. H. 170. Such a construction of the contract is not at all necessary from a consideration of the proper and natural import of the word insurance; and we are unable to comprehend how it can be regarded as expressing the agreement in the minds of the parties without disregarding what every one must understand to have been the purpose contemplated. Contracts are not to be so construed. The same construction would make a second insurance inoperative to terminate the liability of a prior insurer under conditions like that in this policy, if it should appear, after the loss had occurred, that the second insurer had been from the time of making the contract insolvent. The word "insurance," in common speech and with propriety, is used quite as often in the sense of contract of insurance, or act of insuring, as in that expressing the abstract idea of indemnity or security against loss. In that sense the word was used in this contract.

We are sustained in the interpretation of this contract, and in our conclusion, by the following authorities: Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 10 L. Ed. 1044; Bigler v. N. Y. Cent. Ins. Co., 22 N. Y. 402; Lackey v. Georgia Home Ins. Co., 42 Ga. 456; Allen v. Merchants' Mut. Ins. Co., 30 La. Ann. 1386, 31 Am. Rep. 243; Jacobs v. Equitable Ins. Co., 19 U. C. Q. B. 250; Ramsey Cloth Co. v. Mut. Fire Ins. Co., 11 U. C. Q. B. 516; Mason v. Andes Ins. Co., 23 U. C. C. P. 37. See, also, Plath v. Minn. Farmers' Mut. Fire Ins. Ass'n, 23 Minn. 479, 23 Am. Rep. 697, in which, under a stipulation that if the insured should mortgage "the property" insured it should avoid the policy, a mortgage of a part only of the property was held to have that effect. In that case the act of the insured did not violate the letter of the contract; but in that case, as in this, it did

violate its spirit, and tend to defeat the well-understood objects contemplated.

In some courts, in cases like this, a distinction is made resting upon the action or election of the subsequent or "other" insurer. If such insurer avails himself of his legal right, and elects to treat his contract as invalid, it is held not to avoid the first contract; but if he waives the forfeiture, even after the loss by fire has occurred, and treats his contract as valid, then such "other insurance" is deemed to have been a violation of the condition. See David v. Hartford Ins. Co., 13 Iowa, 69; Hubbard v. Hartford Fire Ins. Co., 33 Iowa, 325, 11 Am. Rep. 125. Such a distinction cannot, in our opinion, be sustained. It makes the validity of the contract between two parties to depend, not upon their own agreement, nor upon their own acts, but upon what another person, a stranger to the contract, may do, even after the liability upon the contract had become absolute by the destruction of the property, if, in fact, there was any obligation. This cannot be. The making of the second contract of insurance violated the terms of the former contract, if at all, at the time such second contract was made. The subsequent affirmance or disaffirmance of that contract by the insurer, as he might elect, could not affect the validity of the former contract between other parties. Most of the authorities so hold. See Dahlberg v. St. Louis Mut. Ins. Co., 6 Mo. App. 121, and cases cited.

Order reversed.

VII. Concurrent Insurance

OGDEN v. EAST RIVER INS. CO.

(Court of Appeals of New York, 1872. 50 N. Y. 388, 10 Am. Rep. 492.)

Action on a policy of insurance for $3,000 on plaintiff's stock in trade, "contained in the three-story brick building known as No. 392 Washington street, in the city of New York." Other insurance was permitted. The policy provided that "in case of loss the insured shall not recover on this policy any greater proportion of the loss or damage sustained to the subject insured than the amount hereby insured shall bear to the whole amount insured on the said property." The plaintiffs, at the time of the fire, held fourteen other policies, issued by various companies, to the amount of $47,500, covering said property in No. 392 Washington Street and a large amount of other property owned by plaintiffs. On the 30th November, 1864, all the property insured and covered by said fifteen policies was destroyed by fire. The value of the entire property so destroyed was $88,788.83. The value of the property covered by defendant's policy was $16,305.89. Judgment for plaintiff.

RAPALLO, J. The clause, now usual in policies of insurance, which provides for an apportionment of the loss in case of other insurance on the property, is a part of the contract, and must receive a reasonable construction. We have no right to engraft upon it the rules governing suits for contribution among insurers, nor to restrict its operation to cases where such suits could be maintained, but must look at the language of the clause itself and construe it as we would any other stipulation between the insurer and the insured.

We cannot adopt the view taken of this clause in the case of Howard Ins. Co. v. Scribner, 5 Hill, 298, where it was held (in analogy to the rule in actions for contribution) that where a specific parcel of property is insured by one policy, and the same property is covered by another policy, which also includes other property, the latter policy is to be thrown wholly out of view, and does not constitute other insurance within the meaning of the clause. Neither can we agree to the doctrine contended for by the counsel for the appellant, that the whole sum insured by the more comprehensive policy is to be considered as so much additional insurance upon the parcel separately insured.

Where several parcels of property are insured together for an entire sum, it is impossible to say as to either of the parcels that there is no insurance upon it. Neither is it reasonable to assume that any of the parcels is insured for more than its value where the whole sum insured is less than the aggregate value of all the parcels covered by the policy. The difficulty lies in determining what part of the whole sum insured is to be deemed applicable to either parcel where the policy itself makes no separation.

If the entire property is destroyed, as in this case, the rule laid down in 2 Phillips on Insurance, p. 56, No. 1263, a, and in Blake v. Exch. Mut. Ins. Co., 12 Gray (Mass.) 265, carries out the intent of the clause and works entire equity between the insurers and the insured, as well as between the several insurers. That rule is, in substance, that for the purpose of apportioning the loss in case of over insurance, where several parcels are insured together by one policy for an entire sum, and one of the parcels is insured separately by another policy, the sum insured by the first mentioned policy is to be distributed among the several parcels in the proportion which the sum insured by that policy bears to the total value of all the parcels. Thus in round numbers the sum insured in this case by the policies, other than the defendant's on the property, as an entirety, was $47,000. The total value of the property covered by these policies was $88,000. In case of a total loss, each parcel should be deemed insured thereby for $^{47}/_{88}$ of its value. The parcel separately insured by the defendant was worth $16,000, and was insured by the defendant for $3,000, which was equal to $^{3}/_{16}$ of its value. It is manifest that there was no over insurance, and that consequently there is no occasion for any apportionment.

Whether this would be the proper rule in case the $16,000 parcel alone had been destroyed or damaged, it is not now necessary to determine. In that event, if the defendant's policy had not existed, the whole loss would have been recoverable under the $47,000 insurance. It may be that the rule for ascertaining the amount of insurance upon any particular parcel where insurances are commingled, as in this case, is dependent upon the extent of the loss, and that whatever could be recovered upon the more comprehensive policy without regard to the other is the amount to be deemed insured thereby on the part injured in case of a partial loss, and that on that basis an over insurance to the extent of the separate policy might be established. By insuring several parcels of property for an entire sum the insured obtains the advantage, and the insurer subjects himself to the liability of having so much of the total sum insured as may be necessary to compensate for damage to any part of the property applied to that part, though the sum named in the policy would have been insufficient to cover the loss if the whole had been destroyed. Thus it is left to the result, in case of a partial loss, to determine what sum is insured upon any particular parcel, the only limit being its value. On the other hand, it would be desirable to adopt a general rule applicable to all contingencies. We refrain from expressing an opinion now upon the several phases which might be developed under an insurance of this character in case of partial loss, confining our adjudication to the case before us, which was that of a total loss of the whole subject insured by all the policies.

The judgment should be affirmed with costs. All concur.

Judgment affirmed.[14]

[14] The great weight of authority is in accord with the principal case. See Farmers' Feed Co. v. Scottish Union & National Ins. Co., 173 N. Y. 241, 65 N. E. 1105 (1903); Stephenson v. Insurance Co., 116 Wis. 277, 93 N. W. 19 (1903). But in Pennsylvania it is uniformly held that other insurance is not to be regarded as concurrent unless coextensive. Meigs v. Insurance Co., 205 Pa. 378, 54 Atl. 1053 (1903). But see Meigs v. Assurance Co. (C. C.) 126 Fed. 781 (1904), applying the general rule to exactly the same facts. See 4 Cooley, Briefs on Insurance, 3103.

SECTION 2.—LOSS OR DAMAGE

I. What is Loss by Fire?

SCRIPTURE v. LOWELL MUT. FIRE INS. CO.

(Supreme Judicial Court of Massachusetts, 1852. 10 Cush. 356, 57 Am. Dec. 111.)

Action on a policy of insurance on a dwelling-house owned by plaintiff, but occupied by one Elbridge Smith, whose minor son, without plaintiff's knowledge, brought a cask of gunpowder into the attic and fired it with a match, doing considerable damage. Perkins, J., in the Court of Common Pleas, gave plaintiff judgment for the total damage done, on an agreed statement of facts, and defendants appealed to this court.

Cushing, J. The case finds that a burning match being applied, without fault of the plaintiff, to a cask of gunpowder in the attic of his house, the gunpowder took fire, exploded, set fire to a bed and clothing, charred and stained some of the woodwork, and blew off the roof of the house; and the only question in the case is, whether the loss thus occasioned to the building is covered by the conditions of an ordinary policy against fire. The question may be generalized thus: By the ignition of gunpowder within a dwelling-house, damage is done to the house, that damage consisting in part of combustion and in part of explosion. Is the whole damage covered by a policy insuring "against loss or damage by fire?"

The very anomalous case of Austin v. Drew, 6 Taunt. 436, has been adduced in argument and greatly relied upon, as having apparent analogy to this; but when that case is examined, the analogy disappears. The evidence there was, of a building of several stories, in each of which sugar, in a certain state of preparation, was deposited for the purpose of being refined; and a chimney, running up through the building, formed almost one whole side of each of the stories; and by means of this chimney, heat was communicated to the several rooms containing the sugar, and thus acted on it chemically. At the top of the chimney was a register used to shut in the heat during the night. The servant of the assured, in lighting the fires in the morning, neglected to open the register, in consequence of which, undue heat came out into the heating-room, and the sugars were thereby injured. And the action pending, was to recover damage for this under a policy of insurance against loss by fire.

The decision in Austin v. Drew has been assumed to establish that, "to bring a loss within the risk insured against, it must appear to have been occasioned by actual ignition, and no damage occasioned by mere

heat, however intense, will be within the policy." 2 Marsh. on Ins. (3d. Ed.) 790. This proposition is not the point of the case; and it cannot be sound law; for it may well happen that serious damage, within the scope of a fire policy, shall be done to a building, or to its contents, by the action of fire in scorching paint, cracking pictures, glass, furniture, mantelpieces, and other objects, or heating and thus actually destroying many objects of commerce, and yet all this without actual ignition—that is, visible inflammation.

All these manifest errors, and the doubts they throw over the case of Austin v. Drew, are dispelled at once by the report of it in Holt and in Campbell, as it was tried at Nisi Prius. There it appears that the claim was for damage to the sugars by overheating only. And Chief Justice Gibbs said: "I am of opinion that this action is not maintainable. There was no more fire than always exists when the manufacture was going on. Nothing was consumed by fire. The plaintiffs' loss arose from the negligent management of their machinery. The sugars were chiefly damaged by the heat. And what produced the heat? Not any fire against which the company insured, but the fire for heating the pans, which continued all the time to burn without any excess. The servant forgets to open the register by which the smoke ought to have escaped and the heat to have been tempered." And when one of the jurymen suggested that fires arising from negligence of servants were covered by fire policies, Chief Justice Gibbs assented, and said it was not the case of a fire arising from negligence, for there was no fire except where it ought to have been; but it was the case of the damage of an article in the process of manufacture by the unskillful management of the fire used as an agent of the manufacture. Austin v. Drew, 4 Campb. 360; Holt, N. P. 126.

If, in Austin v. Drew, the fire had been where it ought not to be, if, even with careless management, it had burned the building, and notwithstanding it was fire maintained only for the purpose of manufacture, then all the observations of the court go to show that, in this instance, as in that of the whaleship mentioned in Emerigon (1 Tr. de Ass. 436), the insurers would have been held to be liable for the loss. This, therefore, and this only, as correctly stated by Beaumont (Ins. 37), is decided by the case of Austin v. Drew; namely, that where a chemist, artisan, or manufacturer, employs fire as a chemical agent, or as an instrument of art or fabrication, and the article, which is thus purposely subjected to the action of fire, is damaged in the process by the unskillfulness of the operator, and his mismanagement of heat as an agent or instrument of manufacture, that is not a loss within a fire policy. This, we apprehend, is good policy and sound law. But it does not touch at all the present case. It has been thought proper thus to analyze the case of Austin v. Drew, because having been variously reported by four different reporters, and presenting itself prominently in several of the text-books, but in nearly all of them with more or less of misconception, it has become the

starting point, in legal construction, of conflicting lines of argument leading to sundry false conclusions, and, among others, that of a supposed application to the present question.

Some adjudications have also been cited of questions arising in the contingency of damage done by lightning. Thus, in Kenniston v. Merrimack Insurance Company, the Supreme Court of New Hampshire decided that damage done by lightning, without any combustion to indicate the presence of fire, is not within the terms of a policy against "fire by accident, lightning, or by any other means"; the court, in a brief opinion, deducing the conclusion from the assumed premises that lightning per se is not fire. 14 N. H. 341, 40 Am. Dec. 193. The same conclusion, upon similar facts and upon the same words of insurance, "fire by lightning," is elaborately reasoned out in a recent case in New York, Babcock v. Montgomery County Insurance Company, 6 Barb. (N. Y.) 637; where it is held, that, to constitute a loss within the policy, there must be fire, or burning, and that damage by lightning in other forms is not the risk intended by the contract; because, though caloric may generate electricity, or electricity caloric, yet caloric and electricity are distinct things in nature.

The principle adjudged in the cases of this class will be readily seen by reversing the question. Suppose, not as fact but as mere supposition, a policy insuring against damage done through electricity generated by caloric. Obviously, this would not cover damage done by fire only, electricity not being evolved. So, in the actual case reported, of insurance against fire produced by lightning, if the effects be of lightning only, without exhibition of fire, it would not, according to the above decision, be within the policy. Or suppose insurance on cattle against the risk of death by fire alone. In that assumption, if the cattle die, as they may, by a stroke of lightning, without a burn or any other action of fire on their bodies, it would not be the risk contemplated by the contract. Beaumont on Ins. 37.

The question of loss by lightning is very summarily disposed of in the older authorities by treating electricity as fire from heaven. See 1 Emerigon, c. 12, § 17, No. 1, and the authors there cited. But the progress of knowledge has led to juster notions of the nature of lightning, and, of course, to different conclusions touching its legal relations, which are correctly summed up by a late writer as follows: namely, that fire includes lightning if there be any mark of fire, but not otherwise. Beaumont on Ins. 37.

These cases of damage by lightning bear on the present question, therefore, if at all, only by very distant analogy. Neither of them covers it or has any direct relation to it. To the contrary of this, in New York, at least, the same courts which decide that loss by lightning merely is not covered by a fire policy, decide that loss by the explosion of gunpowder is. There is a series of cases precisely in point which expressly decide, or by implication assume, that damage done by the explosion of gunpowder ignited within a building, as well as

that done by its combustion, is within the risk of a fire policy. The case of Grim v. Phœnix Insurance Company was this: A vessel, insured against fire, was partly laden with gunpowder, which, being ignited by carelessness, the vessel was blown up and totally lost. It was argued by eminent counsel, and the opinion was given by Thompson, C. J., and throughout the case it seems to be assumed that the loss was, in respect to its cause, within the policy, and the decision was made to depend on other considerations, 13 Johns. (N. Y.) 451. The same conclusion is also assumed in the case of Duncan v. Sun Fire Insurance Company, 6 Wend. (N. Y.) 488, 22 Am. Dec. 539. In the case of City Fire Insurance Company v. Corlies, the claim was on a fire policy for merchandise destroyed not in burning, but through the blowing up of the building wherein it was stored, by means of gunpowder; and the court expressly adjudged this to be "a loss by the peril insured against, within the meaning of the policy." 21 Wend. (N. Y.) 367, 34 Am. Dec. 258.

The question, we admit, is a nice one. Upon careful reflection, however, we have come to the conclusion that the received opinions on the subject and the adjudications referred to are in accordance with reason and principle. It seems not to be denied that actual combustion, produced by the ignition of gunpowder, is within the present policy. If, then, a combustible substance in the process of combustion produces explosion also, it is not easy to perceive why, of the two diverse but concurrent results of the combustion, the one should be ascribed to fire any less than the other. The plain fact here is the application of fire to a substance susceptible of ignition, the consequent ignition of that substance, and immediate damage to the premises thereby. It is no sufficient answer to say that some of the phenomena produced are in the form of explosion. All the effects, whatever they may be in form, are the natural results of the combustion of a combustible substance; and, as the combustion is the action of fire, this must be held to be the proximate and legal cause of all the damage done to the premises of the plaintiff.

Our opinion excludes, of course, all damage by mere explosion, not involving ignition and combustion of the agent of explosion, such as the case of steam, or any other substance acting by expansion without combustion. See Perrin's Administrator v. Protection Insurance Co., 11 Ohio, 146, 38 Am. Dec. 728. It likewise excludes all damage occasioned but remotely or consequentially through the agency of gunpowder, such as injury done to a house by falling fragments in the blasting of rocks, or the shattering of a house by the stroke of a cannon-ball, in which examples the shock of a projectile, and not ignition or combustion, is the proximate cause of the damage done. We recognize and accept, in the full force of its application, the maxim: "In jure non remota causa sed proxima spectatur." Bacon's Max. 1.

The legal relations of marine insurance have been copiously discussed in many express treatises of elaborate erudition, and are con-

sidered in a great number of judicial decisions, in which the whole subject has been explored with wonderful acuteness and comprehension of logic and of learning; while fire insurance, as a branch of legal knowledge, is, comparatively speaking, in its rudiments. The cases on marine insurance throw little if any light on the present question, except in so far as they attempt to prescribe a rule for distinguishing between what is remote and what is proximate cause. The conclusion reached in this discussion, as may be seen by the latest investigation of the point in Great Britain, Montoya v. London Assurance Co., 6 Exch. 451, is that, while for most cases it is practicable to draw the line, and to formalize a rule between the two classes of causes, yet, in other cases, according to the general law of nature, the two classes approach and run into one another until the distinction vanishes; and within the limits of this debatable land of differences, it is necessary to apply judicial discretion to the particular questions as they arise, just as it is in the not infrequent inquiry whether a thing, or the use or measure of it, be reasonable or not. In Montoya v. London Assurance Co., it was determined that, where the lower part of a cargo is damaged by sea water and, by the evolution of gases from the part thus damaged or the propagation of heat arising from fermentation, the superior part of the cargo be damaged also, the loss on the latter is by the perils of the sea, the involvement of the secondary effect in the primary one being an example of causa proxima.

In the present case there is no room for question concerning a series of causes, as whether primary or secondary, proximate or remote; for the agent is one and the same throughout, namely, fire. The causa was burning powder; the causa causans was a burning match; at each stage of causation it was the action of fire. Nay, to be exact, the burning of the gunpowder, like the burning of the match, was a succession of several complex acts of burning, yet fire is the agent at each of these distinct stages of causation. Suppose there was a barrel of sulphur in the plaintiff's attic instead of gunpowder, and this being ignited with a match, afterwards the fire had passed from the burning sulphur to the substance of the house. This would be recognized at once as a case of fire. It does not change the legal relation of causes to substitute a barrel of burning gunpowder for a barrel of burning sulphur. The only difference in the elements of the question is, that the gunpowder, when ignited, consumes with more of rapidity than sulphur, and the combustion is accompanied or followed by explosion. Still, the agent is fire, though it acts in different ways upon the different successive subjects of its action, beginning with the match and terminating with the plaintiff's house.

On the other hand, cases are conceivable, other than by the use of gunpowder, of explosion without any combustion, which, nevertheless, being the result of the action of fire, are still, it would seem, within the range of the general principle. Various mineral substanc-

es exist, of value in commerce and the arts, which explode by the action of fire, without either ignition or combustion. In general, any close vessel of whatever material composed, when filled with an expansive fluid, is liable to explode by the action of heat, though it may be that the vessel and its contents are alike incombustible. The same thing happens, under certain conditions, to some forms of wood; which, although combustible, may by the action of fire explode, without ignition; or which, as in the present case, of a house, by having compressed within it some burning substance, which is explosive as well as combustible, like gunpowder, may suffer the double injury of combustion in part and in part of explosion.

If, however, the question of consequential damage needed to be explored for the determination of the present case, it would serve to confirm the conclusion at which we have on other premises arrived. Thus, in Great Britain, damage which occurs consequentially in the case of a fire, by reason of confusion of mind, as in throwing fragile objects out of the window, or by sudden terror from alarm, as in leaving open the top of a barrel, and thus wasting the contents, is held to be loss by fire, according to the usages of insurance offices or established legal principle. Beaumont on Ins. 41. So it is in the case of a beam, cornice, or coving, removed to prevent the spread of conflagration. Id. We understand the same to be the rule, in the case, for instance, of a fire in the upper story of a building, and the destruction or damage of goods in a lower story, not by fire, but by the water thrown into or upon the building for the purpose of extinguishing the fire. All these are fit illustrations of the question of merely consequential damage.

In the hypothesis that fire is to be regarded as causa proxima in the present case we can see but one supposable defect; namely, the suggestion that, though it be conceded that the explosion of burning gunpowder, and its effects, are the action of fire, yet this particular effect on the building is not exhibited in the form of igneous action. The cases above supposed, of the shrivelling of some masterpiece of pictorial art, the cracking or discoloration of a rich vase or gem, the bursting of a cask of wine through the expansion of its contents, these, it may be said, are distinctly cases of damage, without ignition it is true, but by the direct and specific action of heat as such; while it is denied that such is the fact in the present case of the blowing up of a dwelling-house by the ignition of gunpowder. We do not think the premises of this argument are sustained by the physical facts which occurred. If they were so, then the nearest analogy would be of damage by smoke; that is, the moisture thrown off by burning wood, and carrying with it ashes, empyreumatic oil, and other constituent parts of the wood, either in their natural condition, or transformed by the process of combustion. Now it is obvious that mere smoke, without any direct action of heat, may do great damage to many kinds of merchandise, such as delicate textile fabrics, esculent vegetables,

articles of taste, and other numerous objects; and if a dwelling or a magazine take fire, and some parts of it only be consumed, but the contents of apartments, to which the actual fire does not extend, are nevertheless damaged by the smoke penetrating into and filling them, can it be doubted that the damage thus done is a loss within the ordinary conditions of a fire policy? Semble, per Gibbs, Chief Justice, arguendo, in Austin v. Drew, Holt N. P. 127. Yet, incontestably, damage by smoke is an effect, which is not in itself igneous action, though it be the result thereof; while, as we conceive, the explosion of gunpowder is igneous action.

In conclusion, we think the rule, which we propose for the present case, reconciles all the conditions involved in the question; is conformable to the nature of things; and constitutes a coherent and consistent doctrine, namely, that where the effects produced are the immediate results of the action of a burning substance in contact with a building, it is immaterial whether these results manifest themselves in the form of combustion, or of explosion, or of both combined. In either case, the damage occurring is by the action of fire, and covered by the ordinary terms of a policy against loss by fire.

Judgment for the plaintiff.

LYNN GAS & ELECTRIC CO. v. MERIDEN FIRE INS. CO. et al.

(Supreme Court of Massachusetts, 1893. 158 Mass. 570, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. Rep. 540.)

Contract, against several insurance companies, upon concurrent policies of the Massachusetts standard form, insuring the building and machinery of the plaintiff against loss or damage by fire. At the trial, before Hammond, J., it appeared that within the period for which the policies were written a fire occurred in the wire tower, so called, of the plaintiff's building, through which the wires for electric lighting were carried from the building, which fire was speedily extinguished, without contact with other parts of the building and contents, and with slight damage to the tower or its contents; that at about the same time, and in a part of the building remote from the fire and untouched thereby, there occurred a disruption by centrifugal force of the fly-wheel of the engine and of certain pulleys connected therewith, by which disruption the plaintiff's building and machinery were damaged to a large amount.

The defendants introduced evidence tending to show that the slipping of a belt was the cause both of the fire in the tower and of the disruption of the machinery, and that a defective pulley might have contributed to cause the disaster. The jury found for the full damage arising from the disruption of the machinery,

and the defendant's alleged exceptions to the refusal of the court to give certain instructions and to certain parts of the instructions that were given. The substance of the exceptions is sufficiently stated in the opinion of the court.[15]

KNOWLTON, J. The only exception relied on by the defendants in these cases is that relating to the claim for damage to the machinery used in generating electricity and to the building from a disruption of the machinery. This machinery was in a part of the building remote from the fire, and none of it was burned. In his charge to the jury the judge stated the theory of the plaintiff as follows: "The plaintiff says the position of the lightning arresters in the vicinity of the fire was such that by reason of the fire in the tower a connection was made between them called a short circuit; that the short circuit resulted in keeping back or in bringing into the dynamo below an increase of electric current that made it more difficult for this armature to revolve than before, and caused a higher power to be exerted upon it, or at least caused greater resistance to the machinery; that this resistance was transmitted to the pulley by which this armature was run, through the belt; that that shock destroyed that pulley; that by the destruction of that pulley the main shaft was disturbed and the succeeding pulleys up to the jack-pulley were ruptured; that by reason of pieces flying from the jack-pulley, or from some other cause, the fly-wheel of the engine was destroyed, the governor broken, and everything crushed—in a word, that the short circuit in the tower by reason of the fire caused an extra strain upon the belt through the action of electricity, and that caused the damage." The plaintiff contended that the short circuit was produced by the fire, either by means of heat on the horns of the lightning arresters, or by the flame acting as a conductor between the two horns, or in some other way. The jury found that the plaintiff's theory of the cause of the damage was correct, and the question is whether the judge was right in ruling that an injury to the machinery caused in this way was a "loss or damage by fire," within the meaning of the policy.

The subject-matter of the insurance was the building, machinery, dynamos, and other electrical fixtures, besides tools, furniture, and supplies used in the business of furnishing electricity for electric lighting. The defendants, when they made their contracts, understood that the building contained a large quantity of electrical machinery, and that electricity would be transmitted from the dynamos, and would be a powerful force in and about the building. They must be presumed to have contemplated such effects as fire might naturally produce in connection with machinery used in generating and transmitting strong currents of electricity.

[15] The statement of facts is much abbreviated.

The subject involves a consideration of the causes to which an effect should be ascribed when several conditions, agencies, or authors contribute to produce an effect. The defendants contend that the application of the principle which is expressed by the maxim, "In jure non remota causa sed proxima spectatur," relieves them from liability in these cases. It has often been necessary to determine, in trials in court, what is to be deemed the responsible cause which furnishes a foundation for a claim when several agencies and conditions have a share in causing damage, and the best rule that can be formulated is often difficult of application. When it is said that the cause to be sought is the direct and proximate cause, it is not meant that the cause or agency which is nearest in time or place to the result is necessarily to be chosen. Freeman v. Mercantile Accident Association, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753. The active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source is the direct and proximate cause referred to in the cases. McDonald v. Snelling, 14 Allen, 290, 92 Am. Dec. 768; Perley v. Eastern Railroad, 98 Mass. 414, 419, 96 Am. Dec. 645; Gibney v. State, 137 N. Y. 529, 33 N. E. 143.

In Milwaukee & St. Paul Railway v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256, Mr. Justice Strong, who also wrote the opinions in Insurance Co. v. Transportation Co., 12 Wall. 194, 20 L. Ed. 378, and in Western Massachusetts Ins. Co. v. Transportation Co., 12 Wall. 201, 20 L. Ed. 380, which are much relied on by the defendants, used the following language in the opinion of the court: "The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied at the other end, that force being the proximate cause of the movement, or as the oft-cited case of the squib thrown in the market-place. 2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

If this were an action against one who negligently set the fire in the tower, and thus caused the injury to the machinery, it is clear, on the theory of the plaintiff that the negligent act of setting the fire would be deemed the active efficient cause of the disruption of the machinery and the consequent injury to the building. It remains to inquire whether there is a different rule in an action on a policy of fire insurance. * * * In suits brought on policies of fire insurance, it is held that the intention of the defendants

must have been to insure against losses where the cause insured against was a means or agency in causing the loss, even though it was entirely due to some other active, efficient cause which made use of it, or set it in motion, if the original efficient cause was not itself made a subject of separate insurance in the contract between the parties. For instance, where the negligent act of the insured, or of anybody else, causes a fire, and so causes damage, although the negligent act is the direct, proximate cause of the damage, through the fire, which was the passive agency, the insurer is held liable for a loss caused by the fire. Johnson v. Berkshire Ins. Co., 4 Allen, 388; Walker v. Maitland, 5 B. & Ald. 171; Waters v. Merchants' Louisville Ins. Co., 11 Pet. 213, 9 L. Ed. 691; Peters v. Warren Ins. Co., 14 Pet. 99, 10 L. Ed. 371; General Ins. Co. v. Sherwood, 14 How. 351, 14 L. Ed. 452; Insurance Co. v. Tweed, 7 Wall. 44, 19 L. Ed. 65.

This is the only particular in which the rule in regard to remote and proximate causes is applied differently in actions on fire insurance policies from the application of it in other actions. A failure sometimes to recognize this rule as standing on independent grounds, and established to carry out the intention of the parties to contracts of insurance, has led to confusion of statement in some of the cases. The difficulty in applying the general rule in complicated cases has made the interpretation in some of the decisions doubtful; but on principle, and by the weight of authority in many well considered cases, we think it clear that, apart from the single exception above stated, the question, What is a cause which creates a liability? is to be determined in the same way in actions on policies of fire insurance as in other actions. Scripture v. Lowell Ins. Co., 10 Cush. 356, 57 Am. Dec. 111; New York & Boston Despatch Express Co. v. Traders' & Mechanics' Ins. Co., 132 Mass. 377, 42 Am. Rep. 440; St. John v. American Ins. Co., 11 N. Y. 516; General Ins. Co. v. Sherwood, 14 How. 351, 14 L. Ed. 452; Insurance Co. v. Tweed, 7 Wall. 44, 19 L. Ed. 65; Waters v. Merchants' Louisville Ins. Co., 11 Pet. 213, 225, 9 L. Ed. 691; Livie v. Janson, 12 East, 648; Ionides v. Universal Ins. Co., 14 C. B. (N. S.) 259; Transatlantic Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403; United Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735.

In the present case, the electricity was one of the forces of nature,—a passive agent working under natural laws,—whose existence was known when the insurance policies were issued. Upon the theory adopted by the jury, the fire worked through agencies in the building, the atmosphere, the metallic machinery, electricity, and other things; and working precisely as the defendants would have expected it to work if they had thoroughly understood the situation of the laws applicable to the existing conditions, it put

a great strain on the machinery and did great damage. No new cause acting from an independent source intervened. The fire was the direct and proximate cause of the damage according to the meaning of the words "direct and proximate cause," as interpreted by the best authorities.

The instructions to the jury were full, clear, and correct, and the defendants' requests for instructions were rightly refused. Exceptions overruled.[16]

SECTION 3.—CONDITIONS OPERATIVE AFTER LOSS

I. Proofs of Loss

NANCE v. OKLAHOMA FIRE INS. CO.

(Supreme Court of Oklahoma, 1912. 31 Okl. 208, 120 Pac. 948, 38 L. R. A. [N. S.] 426.)

Action by L. A. Nance against the Oklahoma Fire Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

HAYES, J.[17] * * * The policy also provides if a loss occurs thereunder, the assured shall give immediate notice of such loss in writing to the company, and shall, within 60 days after the fire, un-

[16] EARTHQUAKE CLAUSE.—The disastrous earthquake and fire that destroyed San Francisco in 1906 were the cause of much litigation as to whether the losses were occasioned by the earthquake, within the exemption clauses of the insurance policies, or whether the policies covered the losses. In Williamsburgh City Fire Ins. Co. v. Willard, 90 C. C. A. 392, 164 Fed. 404, 21 L. R. A. (N. S.) 103 (1908), the court held that the clause exempting the insurer "for loss caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority, or for loss or damage occasioned by or through any volcano, earthquake or hurricane, or other eruption, convulsion or disturbance," was to be construed as meaning that only loss resulting *directly* from earthquake was exempted. Consequently, where the fire was communicated to the insured building from other structures, where its origin was directly due to the earthquake shock, the insurance company was liable for the loss as being directly caused by the fire, and only indirectly by the earthquake. See the note to Williamsburgh City Fire Ins. Co. v. Willard, supra, in 21 L. R. A. (N. S.) 103, discussing the following cases: Commercial Union Assurance Co. v. Pacific Union Club, 95 C. C. A. 242, 169 Fed. 776 (1909); McEvoy v. Security Fire Ins. Co., 110 Md. 275, 73 Atl. 157, 22 L. R. A. (N. S.) 964, 132 Am. St. Rep. 428 (1909); Baker & Hamilton v. Williamsburgh City Fire Ins. Co. (C. C.) 157 Fed. 280 (1907); Henry Hilp Tailoring Co. v. Williamsburgh City Fire Ins. Co. (C. C.) 157 Fed. 285 (1907); Richmond Coal Co. v. Commercial Union Assur. Co. (C. C.) 159 Fed. 985 (1908); Board of Education v. Alliance Ins. Co., 37 Ins. Law J. 530 (1908).

[17] Only that part of the opinion relating to proofs of loss is printed. See same case, ante, p. 659.

less such time is extended in writing by the company, render a statement to the company at its office in Muskogee, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the property destroyed, the cash value of each item, and numerous other matters are required by the policy to be included in said statement. This statement which is known as a proof of loss, is required by the policy to be signed and sworn to by the insured. The policy contains also the following provision: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, including appraisal. * * *" The evidence without conflict establishes that no proof of loss as required by the policy has ever been furnished by plaintiff to the company either within the 60 days after the fire or before the trial of this cause in the court below.

The policy contains other requirements, failure to comply with which the insured it is provided shall forfeit the policy; but the policy contains no stipulation of forfeiture for failure to furnish the proof of loss within the 60 days prescribed by the policy. The effect of provisions in insurance policies similar to the one here involved is declared in Joyce on Insurance, § 3282, to be: "If a policy of insurance provides that notice and proofs of loss are to be furnished within a certain time after loss has occurred, but does not impose a forfeiture for failure to furnish them within the time prescribed, and does impose forfeiture for a failure to comply with other provisions of the contract, the insured may, it is held, maintain an action, though he does not furnish proofs within the time designated, provided he does furnish them at some time prior to commencing the action upon the policy. And this has been held to be true, even though the policy provides that no action can be maintained until after a full compliance with all the requirements thereof." The rule of this text is supported by many well-reasoned cases: Northern Assurance Co. v. Hanna, 60 Neb. 29, 82 N. W. 97; Kenton Insurance Co. v. Downs & Co., 90 Ky. 236, 13 S. W. 882, 12 Ky. Law Rep. 115; Steele v. German Ins. Co., 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; Rheimes v. Standard Fire Ins. Co., 39 W. Va. 672, 20 S. E. 670; Gerringer v. North Carolina Home Ins. Co., 133 N. C. 407, 45 S. E. 773; Hartford Fire Ins. Co. v. Redding et al., 47 Fla. 228, 37 South. 62, 67 L. R. A. 518, 110 Am. St. Rep. 118; Southern Fire Ins. Co. v. Knight et al., 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216; Vangindertaelen v. Phenix Ins. Co., 82 Wis. 112, 51 N. W. 1122, 33 Am. St. Rep. 29; Kahnweiler et al. v. Phœnix Ins. Co. (C. C.) 57 Fed. 562. Plaintiff's failure to render proof of loss within the 60 days provided by the policy did not operate to forfeit his policy; but his right of action did not mature thereunder until such condi-

tion was complied with; and, since under all the proof in this case that requirement has never been complied with, he cannot recover in this action. * * *

Judgment affirmed.[18]

WHITE v. HOME MUT. INS. CO.

(Supreme Court of California, 1900. 128 Cal. 131, 60 Pac. 666.)

GAROUTTE, J. This appeal involves a contract of fire insurance, and the first question to be considered arises upon the sufficiency of the complaint. It appears thereby that the fire occurred June 8, 1896, and that proof of loss was made October 19th thereafter. The contract of insurance was attached to the complaint as an exhibit, and in that exhibit we find the following provisions: "And within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to," etc. And again: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." In view of these provisions of the policy, does the complaint state a cause of action, proofs having been made some four months after the fire, and the policy requiring such proofs to be made within 60 days thereafter?

It will be borne in mind that no attempt is made by the pleader to set out facts constituting a waiver. Ostr. Ins. § 223, citing Wood, Ins. § 436, and May, Ins. § 465, says: "The words 'forthwith' and 'as soon thereafter as possible' are construed to mean the same thing; but when a definite time is specified, as 'thirty' or 'sixty' days, neglect or delay beyond such time in furnishing proofs will be fatal if the language of the policy makes the furnishing of proofs within the time designated a condition precedent." Thereupon the author quotes from Owen v. Insurance Co., 57 Barb. (N. Y.) 521, as follows: "The question presented on this appeal is whether the omission of plaintiff to deliver a particular account of his loss and damage within ten days after such loss, according to the seventh section of the condition annexed to the policy, is fatal to his right of recovery. Such provision is doubtless a condition precedent, the performance of which by the plaintiff is indispensable to the right of recovery. * * * Time,

[18] The weight of authority is undoubtedly, in accord with the principal case, that under the standard fire policy a failure to furnish proofs of loss within the time specified does not avoid the policy, but merely suspends the right of the insured to recover thereon. See Orient Ins. Co. v. Clark, 59 S. W. 863, 22 Ky. Law Rep. 1066 (1900); Northern Assur. Co. v. Hanna, 60 Neb. 29, 82 N. W. 97 (1900); Welch v. Fire Ins. Co., 120 Wis. 456, 98 N. W. 227 (1904); Taber v. Insurance Co., 124 Ala. 681, 26 South. 252 (1899); Weiss v. Insurance Co., 148 Pa. 349, 23 Atl. 991 (1892).

too, is the essence of the contract in conditions of this kind, and there is no power in the court to dispense with a condition, or excuse the nonperformance of it. It is only when a duty is created by law that a party is excused from performing it, if performance is rendered impossible by act of God, and not when the duty is created by contract." The author thereupon says: "This statement of the law stands undisputed, and is strongly supported by a large number of decisions from the ablest courts in both England and America."

In the investigation of this question we have found a few cases opposed to the foregoing views, notably Insurance Co. v. Downs, 90 Ky. 236, 13 S. W. 882, and Steele v. Insurance Co., 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85—the latter case being decided by a divided court. The judgment in this latter case turned on the construction given the words "until after" used in the contract of insurance. As to other contracts of insurance which have come before that court wherein the word "unless" was used in the same connection as the words "until after" were used in the Steele Case, an opposite conclusion has been declared. In those cases the words "until after" were held to substantially differentiate the facts in the two classes of cases. It would seem to require a microscopic inspection to discover a substantial difference in the meaning of the terms "until after compliance" and "unless the insured shall have fully complied," yet in the second class of cases, where the proofs have not been furnished within the time agreed, the right to bring an action is held barred (Gould v. Insurance Co., 90 Mich. 302, 51 N. W. 455), while in the first class of cases it is held that the action is not barred. Steele v. Insurance Co., supra. It is quite evident, after reading the various decisions of the supreme court of Michigan, that this question has caused it considerable trouble. But upon careful consideration we are satisfied that the difference in the two forms of expression is unsubstantial, and does not justify contrary conclusions in the two classes of cases.

The policy by direct words says proofs of loss must be furnished within 60 days from the date of the fire. This is the contract between the parties. The period of time provided allows ample opportunity to do the work, and the provision is a most reasonable one. If this requirement of the contract is binding to any extent, if it is binding upon the insured to furnish the proofs of loss, then why is it not equally binding upon him to furnish proofs within 60 days? Why should one provision of the requirements be given effect, and not the other? It is not for this court to say that the one provision holds any more of substance than the other. It is conceded by the Michigan court in all its cases that the proofs must be furnished before the action can be brought, and it seems equally clear that they should be furnished within the time specified, or likewise action cannot be brought. As the court has already shown, the great weight

of authority is in direct line with these views. The contract is that the action cannot be brought until after a full compliance by the insured with all the foregoing requirements. One of these requirements demanded the insured to furnish proofs of loss within 60 days from the date of the fire. At the time this complaint was filed the insured had not complied with this requirement of the contract, and the 60 days had long since gone by.

The court instructed the jury as follows: "The matter for the jury to determine in settling the question as to the right of the defendant to claim the loss of the insurance upon the ground that the proofs were not presented is, were these proofs presented within a reasonable time, the reasonableness of the time to be determined by all the facts and circumstances of the case? If you find that under these facts and circumstances proofs were made within a reasonable time to the insurance company, then it is your duty generally to find in favor of the plaintiffs." In view of what has been said, this instruction is wrong.

It seems unnecessary to discuss the other questions raised by appellant in its brief. For the foregoing reasons, the judgment and order are reversed.[19]

We concur: VAN DYKE, J.; HARRISON, J.

[19] See, in accord, Quinlan v. Insurance Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645 (1892); Cannon v. Insurance Co., 110 Ga. 563, 35 S. E. 775, 78 Am. St. Rep. 124 (1900). In Hatch v. United States Casualty Co., 197 Mass. 101, 83 N. E. 398, 14 L. R. A. (N. S.) 503, 125 Am. St. Rep. 332, 14 Ann. Cas. 290 (1908), the court held that a provision in an accident policy requiring written notice of the injury within ten days of the event causing the same was an absolute condition precedent, and failure to furnish the notice forfeited the policy, even though the causal connection between the event and the insured's injury was not discovered until after the prescribed period had elapsed. See Vance on Insurance, 502; 4 Cooley Briefs on Insurance, 3366.

WHEN DELAY IN FURNISHING PROOFS OF LOSS EXCUSED.—It seems now to be well settled, even in those states in which compliance with the conditions of proofs of loss is required as a condition precedent to recovery on the policy, that a failure on the part of the insured to comply strictly with their terms will be excused, when the circumstances were such as to make strict compliance impossible. See Woodman Acc. Ass'n v. Pratt, 62 Neb. 673, 87 N. W. 546, 55 L. R. A. 291, 89 Am. St. Rep. 777 (1901); Hayes v. Casualty Co., 98 Mo. App. 410, 72 S. W. 135 (1903). Thus where the insured had died, and his personal representatives had no knowledge of the existence of the policy, delay in furnishing proofs of loss beyond the required period was excused. See Fuller v. Insurance Co., 184 Mass. 12, 67 N. E. 879 (1903). The same rule applies in life insurance to the required notice of the death of the insured. See McElroy v. Insurance Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400 (1898). It is manifest, also, that where no limit is placed upon the time in which notice of death is to be given, circumstances will largely determine what is a reasonable time. In Metropolitan Life Ins. Co. v. People's Trust Co., 177 Ind. 578, 98 N. E. 513, 41 L. R. A. (N. S.) 285 (1912), it was held that notice of the death of the insured given two years thereafter was sufficient, when the existence of the policy was unknown until that time. See note in 41 L. R. A. (N. S.) 285; Vance on Insurance, 503.

For similar reasons it is held that mistakes or over-valuations appearing in proofs of loss do not invalidate them, if such misstatements are made in good faith, and not fraudulently. The rule is thus stated in Warner v. Narragansett Ins. Co., 111 Me. 590, 90 Atl. 706 (1914): "In both cases it was

II. Arbitration

AMERICAN CENT. INS. CO. et al. v. DISTRICT COURT, RAMSEY COUNTY, SECOND JUDICIAL DIST.

(Supreme Court of Minnesota, 1914. 147 N. W. 242.)

Certiorari by the American Central Insurance Company and others to review the action of the district court in denying an application of insurers to appoint an umpire to act in making an appraisement of goods damaged by fire. Action of district court affirmed.

Taylor, C. A stock of clothing and men's furnishing goods belonging to the Knox-Burchard Mercantile Company, of St. Paul, and insured under policies containing the provision as to appraising losses required by chapter 421, Laws of 1913 (Gen. St. 1913, § 3318), was damaged by fire on February 9, 1914. The insurers and the insured disagreed as to the amount of the loss. The policy provides that in such an event the loss shall "be ascertained by two competent disinterested and impartial appraisers"; one to be selected by the insurer and the other by the insured. The two appraisers chosen by the parties are to select an umpire; but, if they fail to agree upon the umpire within five days, he may be appointed by the presiding judge of the district court upon the application of either party. The policy further provides that, if either party fails to select an appraiser within the time prescribed, the other appraiser and the umpire may act as the board of appraisers. The insurers demanded an appraisal in accordance with the terms of the policy, and designated C. S. Silk as the person appointed by them to make the same. Thereafter, and within the specified time, the insured designated George R. O'Reilly, a

argued in the defense that the plaintiff's proof of loss included some articles not insured, and some articles not owned by him, and that some articles were fraudulently overvalued. If, in his proof of loss, the plaintiff made intentional false statements, either as to the articles insured or as to the quantity, quality, or value of them, such false and fraudulent statements would constitute a good defense to an action to recover the insurance. Rovinsky v. Assurance Co., 100 Me. 112, 60 Atl. 1025 (1905). But, if the plaintiff acted honestly and in good faith in making his proofs, he would not be debarred from maintaining his actions notwithstanding his proofs of loss contained some erroneous statements, not chargeable to his falsehood, but to his mistake of memory or judgment. And it was a question of fact for the jury to determine upon all the evidence whether or not the plaintiff did act honestly and in good faith, or whether he fraudulently included in his proofs articles that he did not own, or that he knew were not insured, or fraudulently made erroneous statements as to the value of some, or the whole, of the property claimed to have been lost."

practicing attorney residing in St. Paul, as the person appointed by the insured to make such appraisal. The insurers, claiming that O'Reilly was not competent to act as an appraiser, refused to recognize him as such; and, upon the theory that his appointment was a nullity, applied to the district court, as soon as sufficient time had elapsed to permit them to do so, for the appointment of an umpire to act in conjunction with Silk in making the appraisement.

At the hearing the case was submitted to the court upon an agreed statement of facts, and the claim that O'Reilly was incompetent as an appraiser is based wholly upon the facts stated in the following excerpt from the stipulation: "That this application for the appointment of an umpire to act with said C. S. Silk in appraising the said loss suffered by said assured is based solely on the claim that said George R. O'Reilly is not a competent person to act as an appraiser, because he is an attorney at law, and never has been a dealer in men's clothing or furnishings, and on the further claim that, being thus incompetent, the appointment of said George R. O'Reilly was a nullity, and amounted to a failure on the part of the assured to select an appraiser." The district court denied the application of the insurers, and they brought the matter before this court by writ of certiorari.

Unless it appears that O'Reilly was not eligible for the position of appraiser, the action of the district court was correct. The contention that he was not eligible is based solely upon the ground that "he is an attorney at law, and never has been a dealer in men's clothing or furnishings." The insurers in effect assert that a person, to be competent as an appraiser, must possess expert knowledge concerning the matter which he is called upon to appraise and determine, and that an appointment of a person as appraiser who lacks such expert knowledge may be ignored and treated as a nullity. It is perhaps true that, if one party designates as an appraiser a person who is not eligible for that position, the other party may decline to recognize him as such, but, if he do so, he assumes the burden of showing that such appointee is, in fact, ineligible.

It has long been common for fire insurance policies to contain a provision that the amount of loss shall be ascertained by an appraisement to be made as provided in the policy. Similar provisions are frequently found in other forms of contract. Notwithstanding the different wording of such agreements as found in different contracts, the appraisements made thereunder have generally been considered as in the nature of common-law arbitrations, and as governed by the rules applying to such arbitrations, except as otherwise expressly provided. This state has always adopted that view of the law. The rules governing arbitrations have been applied to proceedings for determining the amount of loss under

insurance policies, and for making appraisements under other forms of contract, irrespective of whether the persons determining such matters were designated as "appraisers," "referees," "arbitrators," or otherwise. Powers Dry Goods Co. v. Imperial Fire Insurance Co., 48 Minn. 380, 51 N. W. 123; Mosness v. German-American Ins. Co., 50 Minn. 341, 52 N. W. 932; Janney, Semple & Co. v. Goehringer, 52 Minn. 428, 54 N. W. 481; Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855; Christianson v. Norwich Union Fire Ins. Society, 84 Minn. 526, 88 N. W. 16, 87 Am. St. Rep. 379; Produce R. Co. v. Norwich Union Fire Ins. Soc., 91 Minn. 210, 97 N. W. 875, 98 N. W. 100; Redner v. New York Fire Ins. Co., 92 Minn. 306, 99 N. W. 886; Schoenich v. American Ins. Co., 109 Minn. 388, 124 N. W. 5.

In several of the cases cited, the persons selected by the parties to determine the matter in dispute were designated as "appraisers," and the third person selected by the appraisers to act with them was designated as "umpire." In this respect the terms used were the same as in the case at bar; yet it has been uniformly held that such boards, whether appointed as "appraisers," "referees," or "arbitrators," must afford the parties a reasonable opportunity to be heard and to present their evidence, and that, although they may make a personal examination of the premises and of the property under proper circumstances, they cannot base the award upon their personal knowledge to the exclusion of pertinent evidence offered by the parties.

In Janney, Semple & Co. v. Goehringer, 52 Minn. 428, 54 N. W. 481, the lessees of certain premises constructed a building thereon. The lease provided that, at the expiration of the term, the lessors should purchase the building at its fair market value: such value to be determined by three appraisers, one selected by each party, and the third by these two. The appraisers were duly appointed, but made their award without giving plaintiffs an opportunity to be heard. It was argued that the award was valid on the ground that the appraisers could determine the value from their own knowledge of the subject-matter, as the contract contained no provision to the contrary. The court, however, held the award void because made without giving plaintiffs an opportunity to be heard, and set it aside, saying: "This submission to appraisers to determine the value of the property which should be paid by the one party to the other, the parties agreeing to abide by such decision, was in the nature of an arbitration, and the rule affording a right of hearing is applicable." The court recognized that in some cases an appraisal might be made solely upon the judgment of the appraisers, but held in effect that it could not be so made in cases in which the appraisers, in addition to fixing the value of specific property, would need to determine other disputed questions, unless the contract provided that the appraisers should

act upon their own judgment. And, in respect to the appraisement under the lease then in question, the court said: "The point of the argument is that the appraisers were not merely to determine the simple matter of the value of specific property, but necessarily to construe the contract and determine its legal effect. In such cases the parties had the same right to be heard before their cause was adjudged as they would have in any general arbitration."

In the case at bar the appraisers must determine many matters other than the mere value of specific property produced before them for examination and appraisal. They must determine the quantity of property covered by the policy and on hand at the time of the fire, the quantity destroyed, the quantity damaged, whether the damage resulted from causes covered by the policy or from other causes not covered thereby, and various other questions, both of law and fact, upon which the parties may differ. Under such circumstances the parties are entitled to be heard unless the contract shows that such was not the intention. Janney, Semple & Co. v. Goehringer, supra. The contract contains no provision to the effect that the appraisers shall make the appraisement upon their own judgment without permitting the parties to present their evidence, and the right to be heard and to present evidence in accordance with the rules governing arbitrations has not been surrendered. The duties imposed upon the appraisers do not necessarily require them to be experts, and the contract contains no such requirement, unless it be inferred from the term "competent." In the absence of anything indicating a different intention, this term should be given the same meaning usually given to it when applied to arbitrators. It is undoubtedly desirable that those making an appraisal be familiar with the matters and things which they are called upon to appraise; but, unless so stipulated in the contract, it has never been held, so far as we are aware, that experts only are competent as such arbitrators or appraisers.

The former statute required the policy to provide that the amount of loss, in case of disagreement thereover, should be determined by three disinterested referees to be selected as therein provided. The statute as amended requires the policy to provide that such loss shall be determined by two "competent, disinterested, and impartial appraisers," and a "competent, disinterested, and impartial umpire"; all to be selected as therein provided. The insurers concede that O'Reilly would have been a competent referee under the former statute, but contend that, by changing the statute as above indicated, the Legislature changed the former rule to such an extent that the appraisers are now required to be experts qualified to determine the matters submitted to them from their own knowledge and personal examination without the aid of other evidence. They admit, however, that the appraisers must necessarily receive evidence as to the quantity of goods totally destroyed, and

other like matters not discoverable by examination. The language used does not require that the construction contended for be given it, and, if the Legislature had intended to make any such radical innovation in the former long-established and well-understood rule, it would have expressed such intention in unambiguous terms, and would not have left it to be spelled out by the court from such uncertain expressions.

The objection of the insurers was not well taken, and the action of the district court is affirmed.

III. Limitation of Actions

HART v. CITIZENS' INS. CO.

(Supreme Court of Wisconsin, 1893. 86 Wis. 77, 56 N. W. 332, 21 L. R. A. 743, 39 Am. St. Rep. 877.)

Action upon a policy of insurance against fire. The plaintiff appeals from a judgment in favor of the defendant.

Winslow, J. The action is upon a policy of insurance issued by defendant, November 11, 1890, upon plaintiff's dwelling-house. There is no dispute as to the facts. The house was burned March 5, 1891. Proofs of loss were served May 1, 1891, being within the time required by the policy. The defendant refused payment May 9, 1891, and plaintiff commenced this action May 3, 1892, nearly fourteen months after the fire.

The policy contained provisions requiring immediate notice of loss, proofs within sixty days after the fire, examination of the assured under oath if desired, and appraisal in case of disagreement as to amount of loss; also the following: "This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal, or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. No suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

It was held by the Circuit Court that the action was barred because not commenced within twelve months next after the date of the fire, and plaintiff appeals.

It is well settled that a clause in a contract limiting the time within which an action may be commenced thereon to a time shorter than that allowed by the statute of limitations is valid. The question here is whether the expression "twelve months after the fire" means what it says, or something else. It is to be noticed that the parties here have not used the expression "after the loss occurs.'" Had this been the language used, it might reasonably be claimed, upon authority, that the "loss occurs," not at the date of the fire, but when the loss is ascertained and established and the right to bring an action exists. The decisions in favor of this doctrine are numerous. Steen v. Niagara F. Ins. Co., 89 N. Y. 315, 42 Am. Rep. 297; Spare v. Home Mut. Ins. Co. (C. C.) 17 Fed. 568; Chandler v. St. Paul F. & M. Ins. Co., 21 Minn. 85, 18 Am. Rep. 385; Ellis v. Council Bluffs Ins. Co., 64 Iowa, 507, 20 N. W. 782; Miller v. Hartford F. Ins. Co., 70 Iowa, 704, 29 N. W. 411; German Ins. Co. v. Fairbank, 32 Neb. 750, 49 N. W. 711, 29 Am. St. Rep. 459; Barber v. Fire & M. Ins. Co., 16 W. Va. 658, 37 Am. Rep. 800.

There are, however, many decisions to the contrary: Chambers v. Atlas Ins. Co., 51 Conn. 17, 50 Am. Rep. 1; Johnson v. Humboldt Ins. Co., 91 Ill. 92, 33 Am. Rep. 47; Fullam v. New York Union Ins. Co., 7 Gray (Mass.) 61, 66 Am. Dec. 462; Glass v. Walker, 66 Mo. 32; Bradley v. Phœnix Ins. Co., 28 Mo. App. 7; Virginia F. & M. Ins. Co. v. Wells, 83 Va. 736, 3 S. E. 349; Peoria Sugar Refining Co. v. Canada F. & M. Ins. Co., 12 Ont. App. 418; Blair v. Sovereign Ins. Co., 19 N. S. 372; Travelers' Ins. Co. v. California Ins. Co., 1 N. D. 151, 45 N. W. 703, 8 L. R. A. 769; Schroeder v. Keystone Ins. Co., 2 Phila. (Pa.) 286.

Other cases, bearing more or less directly on the question, might be cited upon either side of the proposition. It seems apparent that it can hardly be said that the great weight of authority is on either side. It is a case where there are two directly opposing lines of authorities, both very respectable in numbers and weight. It was claimed by appellant that this court had substantially approved of the affirmative view of the proposition in Killips v. Putnam F. Ins. Co., 28 Wis. 472, 9 Am. Rep. 506; and Black v. Winneshiek Ins. Co., 31 Wis. 74. Examination of these cases shows that this court expressly declined to pass upon this question. The principle laid down in them is simply that if the insurance company, by its acts, induces the insured to suspend his proceedings and delay action on the policy, the time elapsing during such delay so caused should not be reckoned as a part of the time limited for the bringing of the action. It is an application of the familiar principle of estoppel.

Doubtless the tendency of so many courts to construe the term "loss" as meaning the time when liability was fixed, induced many insurance companies to substitute the word "fire," as in the policy

before us. It would seem as if the phrase "twelve months next after the fire" was susceptible of but one meaning; yet the courts have disagreed upon this question also. In the following cases it has been held that the word "fire" is to be construed as meaning, not the date of the fire, but the time when liability is fixed and an action accrues to the insured. Friezen v. Allemania F. Ins. Co. (C. C.) 30 Fed. 352; Hong Sling v. Royal Ins. Co., 7 Utah, 441, 27 Pac. 171; Case v. Sun Ins. Co., 83 Cal. 473, 23 Pac. 534, 8 L. R. A. 48.

On the other hand, the following cases hold that the limitation begins to run from the date of the fire. Steel v. Phenix Ins. Co. (C. C.) 47 Fed. 863; State Ins. Co. v. Meesman, 2 Wash. 459, 27 Pac. 77, 26 Am. St. Rep. 870; McElroy v. Continental Ins. Co., 48 Kan. 200, 29 Pac. 478; State Ins. Co. v. Stoffels, 48 Kan. 205, 29 Pac. 479; King v. Watertown Ins. Co., 47 Hun (N. Y.) 1.

It is noticeable that all of the three cases above cited which hold that "fire" means the time when liability is fixed rely for authority upon the cases which construe the word "loss" as having such meaning. No attention seems to have been given to the fact that the word "fire" has been substituted for the word "loss." It is also noticeable that in the case of Case v. Sun Ins. Co., 83 Cal. 473, 23 Pac. 534, 8 L. R. A. 48, the facts were that the insured was compelled to submit to examination by the company, and to produce books, bills, and invoices, and that he complied with these requirements as rapidly as he was able, but was unable to fully comply therewith until more than thirteen months after the fire, or a month after the expiration of the time limited for bringing suit. Here, certainly, was a clear case of estoppel. The company, by its own acts, had postponed the time when a cause of action accrued until after the limitation had run, and should clearly be denied the right to rely upon the limitation. See, to this effect, Thompson v. Phenix Ins. Co., 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408. The cases of Friezen v. Allemania F. Ins. Co. (C. C.) 30 Fed. 352, and Hong Sling v. Royal Ins. Co., 7 Utah, 441, 27 Pac. 171, are, however, direct authorities to the effect that "twelve months after the fire" means twelve months after the liability is fixed. The argument in support of this view is briefly that all clauses of the policy must be construed together; that there are clauses which necessitate the making of proofs, the submission of the assured to examination if required, the production of books and papers, and the submission of the question of the amount of loss to appraisers, all of which things will consume time; and, furthermore, the loss not being payable until sixty days after the amount is fixed, it may happen that more than twelve months may elapse after the date of the fire before the company can be sued; and thus the plaintiff's action may be cut off entirely if a literal meaning is to be given to the words. The deduction is that the

parties cannot have meant what they said in the clause under consideration, but must have meant something else, which they did not say.

We cannot assent to this line of reasoning. It does violence to plain words. It smacks too strongly of making a contract which the parties did not make. It construes where there is no room for construction. Plain, unambiguous words which can have but one meaning are not subject to construction. "Twelve months next after the fire" has one certain meaning and but one. It can have no other. It may well be that the insurer may by his acts waive the limitation, or estop himself from insisting on it, as held in the cases of Killips v. Putnam F. Ins. Co., 28 Wis. 472, 9 Am. Rep. 506; Black v. Winneshiek Ins. Co., 31 Wis. 74, and Thompson v. Phenix Ins. Co., 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408, but the invocation of this principle does no violence to the contract of the parties. There is no element of estoppel present here, however. The defendant company have done nothing which has induced the insured to suspend proceedings or delay his action. They notified him at once on the receipt of his proofs that they denied liability. They did not require him to do anything. He had nearly ten months in which to bring his suit. By failing to do so he must be held to be barred by his contract.

The provision of section 1975, R. S., to the effect that no insurance policy shall contain a provision that no action or suit shall be brought thereon, is not applicable, because the clause under consideration is plainly not such a provision.

Judgment affirmed.[20]

[20] The weight of authority is with the principal case. See Riddlesbarger v. Insurance Co., 7 Wall. (U. S.) 386, 19 L. Ed. 257 (1868); Provident Fund Society v. Howell, 110 Ala. 508, 18 South. 311 (1895); Universal Mut. Fire Ins. Co. v. Weiss, 106 Pa. 20 (1884); Chandler v. Insurance Co., 21 Minn. 85, 18 Am. Rep. 385 (1874); Wilkinson v. Insurance Co., 72 N. Y. 499, 28 Am. Rep. 166 (1878); McElroy v. Insurance Co., 48 Kan. 200, 29 Pac. 478 (1892); Vance, Ins. 508; 4 Cooley, Briefs on Insurance, 3955. See, contra, Miller v. Insurance Co., 54 Neb. 121, 74 N. W. 416, 69 Am. St. Rep. 709 (1898); Sample v. London & Lancashire Fire Ins. Co., 46 S. C. 491, 24 S. E. 334, 47 L. R. A. 696, 57 Am. St. Rep. 701 (1895); Insurance Co. v. Scales, 101 Tenn. 628, 640–642, 49 S. W. 743 (1898); Union Central Life Ins. Co. v. Spinks, 119 Ky. 261, 83 S. W. 615, 84 S. W. 1160, 69 L. R. A. 264, 7 Ann. Cas. 913 (1904). In the last case the court in a vigorous opinion overrules the previous cases of Smith v. Herd, 110 Ky. 56, 60 S. W. 841, 1121 (1901), and Lee v. Union Central Life Ins. Co., 56 S. W. 724, 22 Ky. Law Rep. 1712 (1900), in accord with the principal case. The reasons for this action are epitomized by O'Rear, J., as follows: "Stale claims, if allowed, would tend to encourage perjury and fraud. Therefore a statute is passed to restrict their assertion in the courts. On the other hand, claims which are not outlawed, for the reason just assigned, ought to have a forum in which they may be asserted against an unwilling or dishonest obligee. The existence of that right is of great value to the claimant, but it is likewise of great importance to the public, as by it the weak are assured of their rights against the strong—the sum of all government. A contract agreeing in advance that the obligee will not resort to the courts for its enforcement after one year, when the statutes of the state allow fifteen years within which to begin the action upon it, is merely an agreement not to resort to the courts, in spite of the policy and laws of the state which give the right. To enforce such is to put

CHAPTER XI

CONSTRUCTION OF THE POLICY—OTHER KINDS OF INSURANCE

SECTION 1.—LIFE INSURANCE

I. Forfeiture for Nonpayment of Policy Loans

PALMER v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Supreme Court of Minnesota, 1913. 121 Minn. 395, 141 N. W. 518.)

Appeal from District Court, Ramsey County; Frederick N. Dickson, Judge.

Holt, J. In 1887 the defendant, a life insurance company, insured the life of one T. R. Palmer, then 31 years old, for $5,000. The premiums were all to be paid within 15 years, and the insured was to participate in the annual dividend distribution. The policy contained no agreement as to surrender or loan value. After all the premiums were fully paid, and on July 1, 1904, Palmer borrowed of the defendant $1,445, to be repaid September 1, 1905. For security, he pledged with the defendant this policy under a contract containing this provision: "In the event of default in the payment of said loan on the date hereinabove mentioned, the company is hereby authorized at its option, without notice, and without demand for payment, to cancel said policy, and apply the customary cash surrender consideration then allowed by the company for the surrender for cancellation of similar policies, namely, $1,445, to the payment of said loan, with in-

it in the power of one party to practice oppression, and to close the courts against its relief."

The condition limiting the right to bring the action may, like any other condition, be waived by the insurer. Fellman v. Royal Ins. Co., 184 Fed. 577, 106 C. C. A. 557 (1911); Thompson v. Phenix Insurance Co., 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408 (1890); Godchaux v. Merchants' Mut. Ins. Co., 34 La. Ann. 235 (1882); Hanover Fire Ins. Co. v. Hatton (Ky.) 55 S. W. 681 (1900).

Statutes are now numerous either making void the limitation of action by contract shorter than the statutory period, or providing a term within which a right of action cannot be limited. See the following cases, construing such statutes: Karnes v. American Fire Ins. Co., 144 Mo. 413, 46 S. W. 166 (1898); Vesey v. Commercial Union Assur. Co., 18 S. D. 632, 101 N. W. 1074 (1904), clause in standard policy held void because of the statute; Rutherford v. Prudential Ins. Co., 34 Ind. App. 531, 73 N. E. 202 (1905); Keys v. Williamsburg City Fire Ins. Co., 37 Okl. 482, 132 Pac. 818 (1913); Douville v. Pacific Coast Cas. Co., 25 Idaho, 396, 138 Pac. 506 (1914).

terest, the balance, if any, to be payable to the parties entitled thereto on demand, or the company may, at its own option, renew the said loan for one year or less period on the written request of any one of the parties of the second part hereto, and without further notice to any one of the parties of the second part." He failed to pay the loan at maturity, and thereafter the defendant advised him that on October 30, 1905, it had canceled his policy under the pledge agreement, and tendered to him $29 as a balance remaining of the amount allowed by defendant on the cancellation after liquidating his debt to the company. Palmer refused to accept the check and objected to the cancellation.

Nothing more was done till after Palmer's death, which took place in December, 1908, when this action was brought by the plaintiffs, as representatives of his estate, to recover the amount of the policy less the debt of the insured to the company. The case was here on demurrer to the complaint in Palmer v. Mutual Life Insurance Co., 114 Minn. 1, 130 N. W. 250, Ann. Cas. 1912B, 957, to which reference is made for a more complete statement of the alleged facts. The law of the case was also therein determined, to the effect that the policy was pledged, and not mortgaged, to the defendant, and that if the amount agreed upon in the pledge contract as the amount for which the policy was to be canceled in case of default in the payment of the debt was greatly disproportionate to the then true value of the policy, the contract imposed a penalty for the nonpayment of a debt, and no valid cancellation could be made thereunder. Upon the trial the court found that the policy, at the time the defendant undertook to cancel it, was actually worth not less than $1,986.25, nor more than $2,263.97, and held this to be so much in excess of the amount stipulated in the contract to be allowed in case of forfeiture that the contract and attempted cancellation were of no effect, that the policy was still in force, and that plaintiffs were entitled to judgment for the face value thereof less the debt it was pledged to secure. The defendant moved for amendment of the findings and a new trial, and now appeals from the order denying the motion.[1] * * *

The important question, and the one in our opinion determinative of the appeal, is whether the finding that the value of the policy was not less than $1,926.25 is sustained by the evidence. If the agreement was that it could be canceled for $512 less than its true value, or if the attempted forfeiture was for $1,474, when the actual value was at least $1,926.25, we think the amount exacted is so large that it must be held a penalty, the agreement void, and any action taken under it, or upon the same basis, wholly inefficient to cancel or forfeit the policy.[2] * * *

[1] A part of the opinion relating to the effect of the former appeal as fixing the law of the case is here omitted.

[2] A part of the court's very interesting discussion of the elements that go to determine the value of a paid-up policy is omitted.

The measure of damages for a refusal to give a paid-up policy is not the amount of the premium paid, but the actual value of such a policy. Phœnix Mutual Life Ins. Co. v. Baker, 85 Ill. 410. That the value of any life insurance policy of whatever terms and upon whatever risk is susceptible of judicial determination also appears from the following, among other, authorities, some of which, also, are to the point that a nugatory cancellation may be treated, at the option of the insured, either as a conversion or as leaving the policy in full force: Lovell v. St. Louis Mutual Life Ins. Co., 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423; Brooklyn Life Ins. Co. v. Weck, 9 Bradw. (9 Ill. App.) 358; Smith v. St. Louis Mutual Life Ins. Co., 2 Tenn. Ch. 727; New York Life Ins. Co. v. Curry, 115 Ky. 100, 72 S. W. 736, 61 L. R. A. 268, 103 Am. St. Rep. 297; Mutual Life Ins. Co. v. Twyman, 122 Ky. 513, 92 S. W. 335, 97 S. W. 391, 121 Am. St. Rep. 471. * * *

In respect to Palmer's policy, the accuracy of the following figures was fairly well established: Present value of the policy October 30, 1905, as a continuing policy, $2,325.19 (that is, said sum invested at 4 per cent. would produce the face value of Palmer's policy at the end of his expectancy of life, based on the American Experience Mortality Tables); the surrender charge on account of adverse selection, according to the experience of defendant, $211.44; and charge for expense element (loading, which really ought to disappear entirely when the policy is paid up), $127.50. That would leave the cash surrender value $1,986.25. While the company used the American Experience Mortality Tables and 4 per cent. interest in selling this insurance policy—that is, in fixing the premiums—when it comes to taking it back it proposes to use 6 per cent. instead of 4 per cent. and did so in this case. That difference in interest makes a difference of $639 in the surrender value. That the defendant does a large business in loaning money secured by the pledge of policies issued by it, and that a great many borrowers have acquiesced in the customary exaction of the company in calculating surrender values upon cancellation of policies at 6 per cent., may be some evidence of the market value of such policies. It is, however, not very persuasive. When the same party is in the business of both buying and selling the same commodity, we do not appreciate his method if the margin between the buying and selling price is more than a fair profit. A profit of $639, or even $512, appears too great in this instance. We think the testimony adduced warranted the court in finding that the fair surrender value of this policy was not less than $1,926.25.

In our former decision, it is said: "The contention of the defendant, to the effect that, even though the policy has never been legally forfeited and canceled, and is still the valid obligation of defendant, plaintiffs cannot recover, except by showing a payment of the loan or a tender thereof, is not sound. If the policy is still in force, plaintiffs may recover the amount thereof, less the loan, with interest." Defend-

ant insists that it was not necessary to determine the relief plaintiffs were entitled to in the former appeal; hence the quoted part of the opinion is obiter. And it contends that the recovery herein should be limited to the difference between the amount allowed upon the cancellation and the actual value of the policy at that time. Without stopping to consider whether the rule announced in the above quotation was necessary for a disposition of the former appeal, we deem it good law. In the absence of an agreement, the pledgee may not, upon default, without notice, appropriate the pledge. The authorization to cancel in the contract under consideration is so intimately connected with the terms upon which it is to be made that it is not permissible to reject the one and retain the other. Therefore, if the amount agreed upon as the one to be allowed in case of cancellation is such that it imposes a penalty, the whole contract fails, and there is no contractual authority in defendant to cancel or appropriate the policy. If, nevertheless, it did, Palmer had three courses open: He might have ratified the cancellation; he might treat the act as a conversion, and bring suit for its value; or he might proceed on the theory that the policy was still his, and as such a subsisting obligation of the defendant. Palmer had the option to consider the attempt to cancel the policy abortive if the agreement was invalid. He so did by refusing to ratify the cancellation and protesting against it. It follows that, when Palmer died, the representatives of his estate could still treat the policy as an existing obligation against the defendant for the full amount thereof, less the debt of Palmer to it. These authorities sustain this position: Day v. Conn. Gen. Life Ins. Co., 45 Conn. 480, 29 Am. Rep. 693; Metropolitan Life Ins. Co. v. McCormick, 19 Ind. App. 49, 49 N. E. 44, 65 Am. St. Rep. 392; Manhattan Life Ins. Co. v. Wright, 126 Fed. 82, 61 C. C. A. 138.

The defendant suggests that, if the contract be held invalid, there was still a right to resort to the pledge to enforce payment of the debt, and that cancellation would be an appropriate remedy, as held in the former opinion, because of the nature of a life insurance policy. True, but there is no pretense that a cancellation was made under any form recognized as valid in law in the absence of an agreement between the parties. And even if the contract be entirely laid out of the case, an attempted cancellation for an amount including a penalty surely can stand in no better light than a cancellation under a contract void because of the inclusion of a penalty in the same amount. No other cancellation was made than such a one as is described in the pledge contract. The defendant at all times insisted that what it did was under and in virtue of that contract.

It certainly is settled law that, where the pledge agreement does not provide for a forfeiture of the pledge, the pledgor's title cannot be divested without giving him notice of the forfeiture proceeding. There is no claim that Palmer was notified that on October 30, 1905, the policy would be canceled if the debt was not then paid. The notice

that the debt would be due September 1, 1905, and that the defendant in case of default would proceed under the void contract, is not sufficient. Plaintiffs were therefore within their rights when, instead of suing in conversion, as they might have done, this action was brought on the theory that the policy was still in force.

The contention that either laches or estoppel could be found in this case is without force. The cancellation of this paid-up policy was at once repudiated by Palmer. If the cancellation was ineffective, because made under an invalid contract, there was no occasion to bring an action to reinstate the policy. Palmer was not legally required to do anything until the defendant gave due notice of applying the pledge to the payment of the debt. He had paid all the premiums, and not till his death would the policy mature. The plaintiffs, on the facts herein, are clearly not guilty of laches. The fact that the value of this canceled policy has gone into the dividend fund in part, and been distributed, is, in our opinion, not of sufficient importance to sustain a finding of estoppel.

Some minor objections are presented by the record to the steps taken by the trial court; but these, in our judgment, cannot change the result. For the purposes of this case, the exact value of the policy is unimportant, since this is not a suit for conversion, and even then the finding would be sufficient to sustain a judgment based on the lowest value found. It is enough here that the finding shows that the stipulated amount in the pledge agreement includes a substantial penalty for nonpayment of the debt. The legal effect of the attempted cancellation under the invalid contract, or for the same amount as therein stated, can be none other than a nullity in this case; therefore no further findings in that respect need be made. Nor is any finding necessary upon the fact of the tender of the $29, there being no claim that it was accepted. Under the ultimate conclusion reached by the trial court on the vital issue, namely, that the cancellation agreement was invalid, and hence the policy was still in full force, there was no error in refusing to allow the proposed findings on these and other immaterial matters.

The order is affirmed.[3]

[3] Forfeiture for Nonpayment of Premiums.—The rule that there will be no forfeiture of the policy, unless the contract clearly and unequivocally requires it, applies with equal force to the nonpayment of premiums. See the interesting case of Haas v. Mutual Life Ins. Co., 84 Neb. 682, 121 N. W. 996, 26 L. R. A. (N. S.) 747, 19 Ann. Cas. 58 (1909), in which it was held that the failure of the insured to pay the annual premiums for two years did not avoid the policy, in the absence of an express stipulation in the policy to that effect. The settled rule is thus expressed in De Michele v. London & Lancashire Ins. Co., 40 Utah, 312, 120 Pac. 846 (1912), as follows: "A policy of insurance will be enforced even though it contains an express provision that no liability shall attach until the premium is paid if the policy was unconditionally delivered as a completed contract of insurance. The author in 1 Joyce on Insurance, section 79, states the rule in the following words: 'Where the contract is otherwise complete, an unconditional delivery of the policy operates as a waiver of the prepayment of the premium, notwithstand-

II. Incontestable Clause

PHILADELPHIA LIFE INS. CO. OF PHILADELPHIA, PA., v. ARNOLD et ux.

(Supreme Court of South Carolina, 1913. 81 S. E. 964.)

Hydrick, J. This action was brought to have two policies of insurance, issued by the plaintiff on the life of the defendant Q. L. Arnold, in favor of his wife, Mattie H. Arnold, canceled on the ground that they were obtained by fraud. The policies were issued and dated June 11, 1910. The premiums were duly paid. The policies contain this clause: "This policy shall be incontestable, except for nonpayment of premiums, after one year from its date." This action was commenced June 3, 1912, more than a year after the date of the policy. On motion of defendants, issues were referred to a jury, which answered them all in favor of defendants. But the court set aside the verdict, holding that the fraud alleged had been proved, and adjudged the policies void.

From the view which we take of the case, it will be necessary to consider only one question: Is the incontestable clause above quoted a bar to the action? The language is plain—so plain that it does not require interpretation. There can be no doubt of its meaning, and unless there is some reason why an insurance company cannot lawfully make such a contract, this action is barred. The courts, with practical unanimity, hold such a stipulation valid. It is called by some of them a short statute of limitations in favor of the insured, and it is sustained on the analogy of the cases which hold that the parties to a contract may, by stipulation therein fix a reasonable time within which action thereon must be brought, or claims made. We cannot agree that such a stipulation conflicts with the statute of limitations, only in the sense that by its terms the action must be brought within a shorter period than that allowed by law. But the statute of limitations does not expressly or impliedly prohibit such an agreement. It merely fixes the maximum time within which actions may be brought.

ing an express provision therein that the company shall not be liable until the premium is actually paid, and the company cannot, under such circumstances, cancel the policy for nonpayment without first putting the insured in default by some act, such as a new demand. But the mere nonpayment of the premium on demand, does not of itself destroy the policy where the company fails to give notice of its election to rescind the contract.' The law as stated by Mr. Joyce is supported by the following authorities: Farnum v. Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233 (1890); Griffith v. N. Y. Life Ins. Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96 (1894); Berliner v. Travelers' Ins. Co., 121 Cal. 451, 53 Pac. 922, 41 L. R. A. 467, 66 Am. St. Rep. 49 (1898); Raulet v. N. W., etc., Ins. Co., 157 Cal. 224, 107 Pac. 296 (1910)."

No doubt the clause was inserted in the policy as an inducement to the public to insure with the plaintiff company. It is matter of common knowledge that insurance companies have, in the past, so frequently defended against claims under their policies, and tried to defeat payment of them on various grounds—sound and unsound—and especially on the ground of alleged false representations and warranties, that the Legislature of this state deemed it necessary to take the matter in hand, and in 1878 (16 St. at Large, p. 530) a statute was enacted (Civ. Code 1912, §§ 2722, 2723) which provides that, when a company receives the premiums on a policy for the space of two years, it shall be deemed to have waived any right to dispute the truth of the application, or to allege that the insured made false representations. The same statute authorizes the companies to bring actions to vacate policies on that ground, but limits the time to two years from date of the policy. This legislation goes far to prevent these companies from taking a man's hard-earned money as long as he lives, and then slandering his memory after he is dead. While it is true in this case that the insured is alive, that circumstance does not make the meaning of the clause or the application of the law different from what it would be if he were dead. To hold that the clause means only that the company cannot defend for any cause, except nonpayment of premiums, after the death of the insured, is to read into the contract, by construction, what the parties did not write into it.

The objection to taking insurance, arising out of the probability of such a defense being set up, whether founded in truth or not, grew to be such that the insurance companies found it to their advantage to insert in their policies certain stipulations specifying the grounds upon which they could be contested, and limiting the time within which such contest must be made. Of course, other things being equal, the more favorable to the insured these stipulations are, the more attractive will the policies be to insurers, and we have no doubt the clause in question was inserted for that purpose, and that the company has received the benefit of it in that intending insurers have been thereby induced to take its policies.

By the stipulation, the plaintiff practically agreed that it would take a year to investigate and determine whether any fraud had been perpetrated in procuring the policies, and, if it failed within that time to discover any, it would make no further investigation, and would not thereafter contest the validity of the policies on that ground. The evidence in the case shows that, if plaintiff had been diligent, it could have discovered the fraud within the year. Therefore we do not feel that we are condoning the fraud by enforcing the stipulation. The following authorities sustain the validity of such a stipulation: Kline v. Nat. Ben. Ass'n, 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703; Wright v. Mut. Ben. Ass'n, 43 Hun (N. Y.) 61, affirmed 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749; Clement v. Insurance Co., 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am.

St. Rep. 650, and note; Massachusetts Ben. Life Ass'n v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; Murray v. State Mut. Life Ins. Co., 22 R. I. 524, 48 Atl. 800, 53 L. R. A. 743; 25 Cyc. 873, 881; 19 A. & E. Enc. L. (2d Ed.) 79 et seq.

Reversed.

GARY, C. J., and WATTS, J., concur.

FRASER, J. (dissenting). I cannot concur in the opinion of the majority of the court. I think the statutory right of the company to two years may be waived, and that the incontestable clause did waive it, except for fraud. I think the words in the incontestable clause, "all statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties," clearly show that the insurer did not intend to waive any of its rights where there is fraud. The policy also provides that the question of age may be contested. The incontestable clause, therefore, was not absolute, and I think the plaintiff has the right to bring this action within the statutory period.

INDIANA NATIONAL LIFE INS. CO. v. McGINNIS.

(Supreme Court of Indiana, 1913. 101 N. E. 289, 45 L. R. A. [N. S.] 192.)

See ante, p. 622, for the report of this case.

SECTION 2.—ACCIDENT INSURANCE

I. DEATH BY ACCIDENT

BOHAKER v. TRAVELERS' INS. CO. OF HARTFORD, CONN.

(Supreme Judicial Court of Massachusetts, 1913. 215 Mass. 32, 102 N. E. 342, 46 L. R. A. [N. S.] 543.)

Exceptions from Superior Court, Suffolk County; Nathan D. Pratt, Judge.

RUGG, C. J. This is an action of contract to recover upon a policy of accident insurance for the death of the insured, John M. Babson. The circumstances under which the insured lost his life were these: He was delirious by reason of severe typhoid fever in a room with a single window which was covered by a screen, and its sill was 28 inches above the floor. Along the outside of the building slightly below the window was a balcony 5 feet wide with a protecting railing about 30 feet above the rough and stony ground beneath. He was left alone momentarily on an August evening by his attendant, who on return-

ing found the room vacant, and the screen, whole and in position when he left the room, torn from the window. On immediate investigation, the insured was found on the ground under the room unconscious, with severe injuries, which according to physicians probably would have caused his death, even if he had not been suffering from typhoid fever. The policy insured "against bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means (suicide, whether sane or insane, is not covered), as specified in" a schedule annexed.

The case was tried without a jury by a judge, who found for the plaintiff after refusing to rule as requested by the defendant (1) that the plaintiff was not entitled to recover as matter of law; (2) that the death of the insured was not effected, directly and independently of all other causes, through external, violent and accidental means; and (3) that the death of the insured was the result of suicide, sane or insane, and hence not covered by the policy.

1. The defendant's first request was denied rightly. "Accidental means," is used in the contract of insurance in its common significance of happening unexpectedly, without intention or design. U. S. Mutual Accident Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60. The cause of injuries was not wholly conjectural as matter of law. It is plain that the immediate cause was the fall. This manifested itself in evidence which was violent and external. There was basis for the inference that it was accidental, as we have defined that word. It may have been that the deceased, in the heat of his fever and the warm season, in an effort to reach fresh air went to the balcony just outside his window, and there without premeditation or purpose or delirium, but only through weakness, lost his balance and went over the low railing, and received mortal harm. Cases where it has been necessary for a plaintiff to show negligence of some person as the cause, and where it has been said that the cause was conjectural, are clearly distinguishable. Accident is a far more comprehensive term than negligence. Noyes v. Commercial Travelers' Eastern Accidental Ass'n, 190 Mass. 171, 76 N. E. 665; Wicks v. Dowell, [1905] 2 K. B. 225.

2. It would have been error to rule as matter of law that the insured's death was not effected "directly and independently of all other causes" through accidental means. The point of difficulty in this connection is whether the disease did not contribute to the injuries, or at least was it not a cause co-operating with the fall in inducing the result. But the disease may have been found to have been simply a condition, and not a moving cause of the fatal injuries. A sick man may be the subject of an accident, which but for his sickness would not have befallen him. One may meet his death by falling into imminent danger in a faint or in an attack of epilepsy. But such an event commonly has been held to be the result of accident rather than of disease.

In Manufacturers' Accident Indemnity Co. v. Dorgan, 58 Fed. 945, at page 954, 7 C. C. A. 581, at page 590, 22 L. R. A. 620, it was said by Taft, J.: "If the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or slipping, the drowning in such case would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease would be but the condition; the drowning would be the moving, sole, and proximate cause." To the same effect in substance are Winspear v. Accident Insurance Co., 6 Q. B. D. 42; Lawrence v. Insurance Co., 7 Q. B. D. 216; Ludwig v. Preferred Accident Insurance Co., 113 Minn. 510, 130 N. W. 5; Preferred Accident Insurance Co. v. Muir, 126 Fed. 926, 61 C. C. A. 456. The language of this contract, to the effect that the "accidental means" must have operated "independently of all other causes" to produce the death, does not change the general rule of law, that the proximate and not a remote cause is the one to which the law looks. Many instances are found where two equally dominant causes co-operate or concur in producing a result. The very numerous cases arising out of joint or simultaneous torts are illustrations. Two or more causes, each proximate in character and only one of which is accidental, may co-operate in producing an injury. In such cases the limiting language of the policy would apply.

The present policy does not stipulate that there shall be no recovery, if any other circumstances than the accident, directly or indirectly wholly or in part, proximately or remotely, contribute to the injury, as do some insurance contracts which have come before the courts. The policy in the case at bar does not go so far as to require the court to search beyond the active, efficient, procuring cause to a cause of a cause. When one single predominant agency is disclosed, directly producing as a natural and probable result the injury, which is accidental, and which operates independently of other like causes, then the effectual means required by the policy have been found. This contract does not require a further and nicer analysis to ascertain whether in the chain of causation another source less demonstrative and more attenuated in its effect or more ulterior in its origin may be found which may more indirectly have a causal connection with injury. Freeman v. Mercantile Accident Ass'n, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753; Daniels v. N. Y., N. H. & H. R. R., 183 Mass. 393, 67 N. E. 424, 62 L. R. A. 751. See Newton v. Worcester, 174 Mass. 181, 187, 54 N. E. 521.

The single operating, proximate cause, therefore, might have been found to be the fall and not the fever. Accident Insurance Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740; Scheffer v. Railroad Co., 105 U. S. 249, 26 L. Ed. 1070; Isitt v. Railway Passengers Assur. Co., 22 Q. B. D. 504; Continental Casualty Co. v. Lloyd, 165 Ind. 52, 59, 73 N. E. 824; Modern Woodmen Accident Ass'n v.

Shryock, 54 Neb. 250, 74 N. W. 607, 39 L. R. A. 826; Fetter v. Fidelity & Casualty Co., 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560. This being a fact, and there being some supporting evidence, the finding of the trial judge will not be disturbed.

3. The defendant urges strongly that the death of the insured was the result of suicide, sane or insane, and hence there could be no recovery. But while that might have been found as a fact, it could not have been ruled as matter of law. Suicide is a crime and involves a high degree of moral turpitude. Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109. It cannot be assumed without clear proof. The presumption is that one does not commit suicide. Such a presumption, being one of fact, stands until overthrown by evidence. Travelers' Insurance Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308. If it be assumed in favor of the defendant that the burden was on the plaintiff to prove that death was not due to suicide, the presumption against self-destruction in the absence of compelling circumstances sustains this burden. Even though the insured was suffering from delirium, as it is agreed that he was, the facts do not require the inference that he jumped to the ground. It was open to the trial court to find that it was through weakness or otherwise, and not through conscious adaptation of means to an end by a mind unbalanced by fever, that he fell to the earth.

Exceptions overruled. Judgment affirmed.[4]

II. Accident Due to Intoxication

SHADER v. RAILWAY PASSENGER INS. CO.

(Court of Appeals of New York, 1876. 66 N. Y. 441, 23 Am. Rep. 65.)

Action on an accident insurance policy.

The death of the insured occurred under the following circumstances: The insured and one Ward had dinner, including considerable quantities of wine and whisky, together. They fell to boasting of their prowess in shooting, when the insured remarked to Ward that the latter could not shoot a frog. Ward rejoined that he was quite able to shoot the insured through the ear. Thereupon the insured said he might try it for ten cents. The trial was made, but Ward aimed so

[4] There are numerous interesting cases involving the question of what is an accident, and also the other clause, usually inserted in accident policies, insuring against injury by "external, violent, and accidental causes." See Hooper v. Standard Life & Accident Ins. Co., 166 Mo. App. 209, 148 S. W. 116 (1912), where insured died of apoplexy, and the question was whether his fall was caused by apoplexy, or his apoplexy by the fall; Lovelace v.

badly that, instead of piercing the insured's ear, he shot him through the abdomen, so that he died.

In the trial court the plaintiff had judgment, which was reversed at General Term (3 Hun, 424), and a new trial ordered.

MILLER, J. The question arising directly upon this appeal relates to the charge of the judge and to his refusal to charge as requested by the counsel for the defendant. The policy provided that: "No claim shall be made under this policy where the death or injury may have happened while the insured was, or in consequence of his having been, under the influence of intoxicating drinks." The judge in his charge to the jury stated that the question was not simply whether the deceased was under the influence of intoxicating liquors at the time, but it was whether the injury occurred in consequence of that, and it was the natural and reasonable result of his being in that condition; and he charged, in substance, that if the injury happened in consequence of his being under the influence of intoxicating liquors, the plaintiff could not recover. The court was requested to charge that, if at the time Shader was shot he was under the influence of intoxicating drinks, the plaintiff could not recover; and this was so whether the influence of the liquor occasioned the discharge of the pistol or not. This was declined. Exceptions were duly taken to the portion of the charge made and the refusal to charge.

The first inquiry which presents itself to our consideration is the construction to be placed upon the proviso referred to. An exact and accurate interpretation of the language employed manifestly conveys the idea that it was intended to comprehend all cases where injury or death might happen while the assured was under the influence of intoxicating drinks, as well as such as might occur by reason of the use thereof. As to the first class of cases stated in the proviso, the words imply that it is not required that the use of intoxicating drinks should be the moving cause in producing the injury or death, and quite sufficient to avoid a liability that the person in whose favor the policy was issued was under the influence of such stimulants, without regard to the effect which might result from such a condition. The limitation in the policy related to the condition of the insured, not to the cause which might produce his death. And here lies the distinction which is to be drawn in its construction, for, by any other or different interpretation, the words used would not only be unnecessary but meaningless and without point. As the policy was rendered void if the assured was injured or killed while under the influence of intox-

Travelers' Protective Ass'n, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. Rep. 638 (1894), where the insured was shot while trying to expel from a tavern a fellow guest whose indecent conduct provoked him. See, also, McGlinchey v. Fidelity & Cas. Co., 80 Me. 251, 14 Atl. 13, 6 Am. St. Rep. 190 (1888). In the last case it was held that internal injuries received by straining efforts to hold a horse that was running away came from "external, violent, and accidental causes." See Vance on Insurance, 566; 4 Cooley, Briefs on Insurance, 3156–3162.

icating drinks, it was not essential, to work a forfeiture, that injury or death should occur in consequence of the use of the same.

As to the second class of cases the policy was designed to provide for the possible contingency which might arise after the influence of intoxicating liquors had ceased to operate directly, and the subsequent effects produced thereby in consequence of the previous use thereof. The intention, evidently, was to limit the liability of the company by the contract with the assured, and not to incur any responsibility when the injury occurred while the assured was directly under the influence, or where the result was remotely produced by intoxicating drinks. Accidental policies are issued principally to travelers or persons exposed to unusual peril and danger, and the risk in such cases being extremely hazardous it is by no means unreasonable that the insurer should require that the assured should be under no exciting influence which may affect his self-possession or judgment, or seriously interfere with the free, full and deliberate exercise of his faculties in protecting himself from accident or harm. It follows that the proposition laid down by the judge was erroneous; and he also erred in refusing to charge as requested.[5] * * *

As the judge erred upon the trial the judgment was properly reversed and a new trial granted. The order must be affirmed and judgment absolute ordered for the defendant, with costs.

III. Accident Due to Violation of Law

MURRAY v. NEW YORK LIFE INS. CO.

(Court of Appeals of New York, 1884. 96 N. Y. 614, 48 Am. Rep. 658.)

Appeal from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made September 11, 1883, which affirmed a judgment in favor of defendant, entered upon a verdict and affirmed an order and denying a motion for a new trial. This action was brought upon two policies of insurance issued by defendant upon the life of Wisner Murray.

Andrews, J. The policies upon the life of Wisner Murray, each contain a condition that if the assured "shall die in, or in consequence of a duel, or of the violation of the laws of any nation, state, or province," the policy shall be void. The assured died from a pistol shot from a pistol in the hands of one Berdell, upon whom the deceased and his brother had committed a violent assault, and the defense is

[5] A part of the opinion, distinguishing the cases of Bradley v. Mut. Benefit Life Ins. Co., 45 N. Y. 422, 6 Am. Rep. 115 (1871), and Welts v. Connecticut Mut. Life Ins. Co., 48 N. Y. 34, 8 Am. Rep. 518 (1872), is omitted.

based upon this condition in the policy. It is an undisputed fact that the brothers, acting in concert, planned the assault upon Berdell. They stationed themselves in the waiting-room of the station awaiting his arrival, and when he entered the room, Spencer Murray seized him by the arms from behind and held him, while his brother Wisner Murray, standing in front, beat him over the head and face with a raw-hide, striking from ten to twenty blows, inflicting severe and painful wounds from which the blood flowed profusely, covering his face and clothing. The assault was a brutal one, and, so far as appears, without provocation. Berdell testified that in the struggle to escape from Spencer Murray, his hand was involuntarily brought into contact with his hip pocket containing a pistol. He drew it from his pocket, and it appears that Wisner Murray, seeing the pistol, started toward the lunch counter, keeping his face toward Berdell and calling on his brother to "hold him and not to let him shoot." Wisner Murray jumped over the lunch counter, and as he was passing through a door into another room, the pistol in the hands of Berdell was discharged, the ball hitting the assured in the forehead, causing his death.

Berdell, who was called as a witness by the defendant, testified, in substance, that the firing of the pistol was accidental, and was caused by the sudden jerking of his arm by Spencer Murray, who was still holding him, and that he had no intention of firing at the deceased. It is established by the great preponderance of testimony, that until after the pistol was fired, Berdell was in the grasp of Spencer Murray, and was struggling to release himself. Berdell also testified that the deceased, during the time he was retreating, had a pistol, which he pointed at the witness as if aiming at him. He is confirmed as to the deceased having a pistol by another witness, and a pistol was found after the affray on the floor near where the deceased fell, a distance of about thirty feet from the place where Berdell was when the shot was fired. The witnesses differ as to the time which elapsed between the commencement of the affray and the firing of the pistol, the highest estimate given by any witness being thirty seconds.

It is not disputed that the assault made upon Berdell was a violation of law. But it is contended that as, according to the evidence of Berdell, the firing was accidental and not intentional, and as it also appears that it happened after the assured had abandoned the combat, his death was not "in, or in consequence of, a violation of law," and was not, therefore, a death excepted from the operation of the policy. The argument is that death under such circumstances from an accidental shooting, cannot, in a legal sense, be attributed to the violation of law, which preceded it, so as to bring it within the condition of the policy. There must, no doubt, be a relation between the act causing the death and the violation of law to avoid the pol-

icy. In the case of Bradley v. Mutual Ben. L. Ins. Co., 45 N. Y. 422, 6 Am. Rep. 115, involving the construction of a similar clause in a life policy, the court said: "It seems to be clear that a relation must exist between the violation of law and the death to make good the defense; that the death must have been caused by the violation of law."

It may be that the proviso in the policy was primarily intended to exempt the company from the hazard of a death from violence to which persons engaged in the execution of criminal acts are exposed, and especially where the unlawful or criminal act is such as is likely to be met by forcible resistance. It is plain that homicide committed in self-defense would be a death within the condition; so, also, a death at the hands of justice in punishment for crime. The death in these cases would be the direct and legitimate result of the criminal act. Another case, a little further removed from the violation of law as its cause, would be one where a party assailed, in the heat of passion, engendered by the act of the assured, on the moment takes the life of the aggressor, although the provocation might not be a legal justification of the homicide. Such a death we conceive might be within the condition, depending upon circumstances. If the violation of law in which the deceased was engaged was trivial, although calculated to some extent to excite opposition or resistance, but the taking of life was a result which no reasonable man could have contemplated as likely to follow from the unlawful act, there would be no such relation between the act and the death that the former could be said to be the cause of the latter. But if, on the other hand, the party killed was engaged in committing a violent assault, the natural result of which would be to arouse the passions and excite the anger of the party assailed, and in the heat of passion he killed his assailant, the death would, we think, be the result of the unlawful act within the meaning of the policy, although the party causing it exceeded the bounds of lawful resistance. As between the company and the assured, his violation of law ought justly to be treated as the cause of the death, because the deceased must be assumed to have known the danger he incurred, and that a party resisting an assault under such circumstances, and whose anger is naturally excited, does not mark with exactness the line which separates lawful defense from excessive and unjustifiable force.

We have, so far, had in view cases where the death of a person insured was the result of the intentional act of another, or of the law. But while it is probable, as we have said, that cases of this kind were primarily in the contemplation of the parties to the contract, the words of the condition are too broad to permit them to be confined to this narrow and rigid limitation. The proviso clearly exempts the company from all risks of life which attend the violation of law, which are the natural and reasonable concomitants of the

transaction. Prize fighting is prohibited by law, and is attended with some danger. Suppose in such a friendly contest, by mishap one of the combatants strikes a blow which causes the death of the other. Would a death under such circumstances be a death in the violation of law within the policy, although there was no intention to kill? However this might be answered, we think it is clear that there may be a death in violation of law within the meaning of the policy, although not intentionally inflicted, and although it was not occasioned by the act of another. A burglar, who in consequence of a misstep, or to escape detection, falls or jumps from the roof of a house which he is attempting to enter, and is killed, dies in violation of law as plainly as if he had been shot by the owner in defense of his dwelling. In the former as in the latter case, the death results from the criminal act, within the policy, as a natural and reasonable consequence, because, although the immediate cause of the death was the fall, yet the exposure to the danger was encountered in the prosecution of the criminal purpose.

Another case may be stated, of which there may perhaps be more doubt. Suppose the assured in this case instead of having been killed by the pistol had, in the struggle with Berdell, ruptured a blood vessel, or, being predisposed to heart disease, it had been brought on by the excitement of the affray, and he had died from either of these causes in the midst of the struggle. Death from a rupture of a blood vessel, or from disease of the heart, occurring independently of any violation of law, would be covered by the policy. The company assumes the risks of death from these causes under ordinary circumstances. But do they assume such risk when the immediate, exciting cause of the death is the struggle originating in a criminal assault in which the deceased was engaged at the time? To exempt the company, must the death result from some peculiar and special risk connected with the commission of crime? It seems to us not, and that it is sufficient to bring a case within the condition, if there is such a relation between the act and the death that the latter would not have occurred at the time if the deceased had not been engaged in the violation of law.

In the case before us it is said that the shooting was accidental, and not voluntary or intentional, and consequently was not a death in or in consequence of a violation of law. What incidents would attend the assault by the Murrays could not be foreseen. They probably did not know that Berdell had a pistol, and if they had known it, they could not have anticipated that it would be discharged in the manner stated by him. But they took the risk of his resistance to any extremity. They took the risk of any injury which might happen to them in consequence of his handling a deadly weapon, whether such injury was intentional or accidental. The case is to be considered under the actually existing circumstances of the assailants and

assailed, and if the killing under these circumstances was not an unnatural result of the attack, the case is within the condition.

Assuming that Berdell's statement that the shooting was unintentional was binding on the jury, and that the killing was accidental, yet the accident was the result of the struggle of Berdell to free himself from the grasp of Spencer Murray, and the jerking of his arm by the latter. The accident, so called, was caused by the assault, and the risk of injury from the discharge of the pistol was occasioned by the criminal act of the Murrays. The claim that Wisner Murray had abandoned the combat before the firing of the pistol, if true, does not meet the difficulty. He was a party to the original encounter. The struggle with Spencer Murray was continuing when the pistol was fired. If the shot had killed Spencer Murray, and he had been the person insured, there could, we think, be no doubt. It killed his brother who was unfortunately within its range, but at a time when it was said he was attempting to escape from the scene. But he was not relieved from responsibility for the act of his confederate in a crime jointly planned, who was continuing the assault, and the act of Spencer Murray in jerking the arm of Berdell, causing the explosion, is as to the company the act of both.

We are of opinion, assuming as true to its full extent the statement made by Berdell, that the defense was established. If, as there is some slight evidence to show, Berdell fired the pistol after he had escaped from Spencer Murray, the case is not changed. At all events the jury upon that theory of the case might well have found, and could not justly have found otherwise, that it was fired by Berdell in the heat of passion, and under circumstances which, if they did not fully justify him, made the firing and the consequent death a natural and reasonable consequence of the assault. Whether, therefore, the firing of the pistol was intentional or not, or whether Wisner Murray had or had not abandoned the combat, the jury upon the evidence were justified in finding, as they did by the general verdict, that the assured died in, or in consequence of, a violation of law. This conclusion answers the points made upon the exceptions to the charge.[6] * * *

We think the judgment should be affirmed. All concur, except DANFORTH, J., absent.

Judgment affirmed.[7]

[6] A part of the opinion omitted deals with the action of the trial court in submitting to the jury certain special questions, held to be immaterial, and distinguishes Ebersole v. Northern Central Railroad Co., 23 Hun, 114 (1880).

[7] Other cases construing this same condition are: Utter v. Insurance Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913 (1887); Goetzman v. Insurance Co., 3 Hun (N. Y.) 515 (1875); Supreme Lodge v. Bradley, 73 Ark. 274, 83 S. W. 1055, 67 L. R. A. 770, 108 Am. St. Rep. 38, 3 Ann. Cas. 872 (1904); Railway Mail Ass'n v. Moseley (C. C. A.) 211 Fed. 1 (1914), and cases cited therein.

SECTION 3.—LIABILITY INSURANCE

CHAPIN v. OCEAN ACCIDENT & GUARANTEE CORPORATION.

(Supreme Court of Nebraska, 1914. 147 N. W. 465.)

LETTON, J. Action to recover upon an automobile indemnity insurance policy. Defendant demurred to the petition. The demurrer was overruled. Defendant elected to stand thereon, and judgment was rendered for plaintiff. Defendant appeals.

The petition in substance alleges that on March 30, 1910, the defendant, in consideration of a premium of $78, issued and delivered to plaintiff an insurance policy by the terms of which it agreed for one year thereafter to indemnify the plaintiff against loss for liability imposed upon him by law for damages on account of bodily injuries accidentally suffered as the result of the use of an automobile owned by plaintiff, to contest and defend suits brought on account of such injuries, and to reimburse plaintiff for expenses incurred in providing immediate surgical relief in case of accident. On March 1, 1911, plaintiff's automobile, when being driven by his employé, collided with one William N. Lewis, who was then riding a bicycle. The fender struck Lewis with sufficient force to throw him from the bicycle to the pavement and shocked him. Plaintiff was immediately notified, and at once interviewed Lewis, and was told by Lewis that he was not hurt. Relying on this statement, plaintiff did not notify defendant of the collision. Lewis continued in his usual and customary employment, and the plaintiff heard nothing further about the collision until on or about February 22, 1912, when he was advised that Lewis was suffering from a species of paralysis, and at the time claimed that his condition was traceable to and caused by the fall upon his collision with the plaintiff's automobile. Immediately upon receipt of this advice, plaintiff notified defendant of the facts and circumstances touching the accident, and the statement by Lewis that he was not hurt at the time, and also of the condition of Lewis at that time, and of the claim that it was traceable to the fall received in the collision aforesaid. During the interval between the collision and the time of receiving the notice of claim of Lewis, plaintiff honestly believed the statement of Lewis that he had received no injury from the collision, for which reason plaintiff did not give notice of the collision to defendant. Afterwards plaintiff was notified by an attorney that Lewis was about to bring suit for damages. He thereupon at once notified defendant of this fact, and requested defendant to take up the matter and settle or defend any suit brought by Lewis on account of the injury.

Defendant disclaimed any liability, for the reason that plaintiff had

not given notice at the time of the collision. About August 1, 1912, Lewis died of a disease alleged to have resulted from the fall. An administratrix was appointed, who brought suit against this plaintiff. Defendant again refused, upon demand, to defend the action. Plaintiff was compelled to employ counsel, who, after full investigation, advised plaintiff that the claim contained elements which might subject plaintiff to a large judgment upon a trial of the case to a jury, and recommended a settlement if the same could be reached upon a reasonable basis. Finally by agreement a judgment for $2,500 and costs was rendered against him. A number of other facts are set out, showing proper diligence in the effort made by plaintiff to defend the action against him. It is also alleged that plaintiff incurred a liability for legal expenses and services in the sum of $500.

A copy of the policy is attached to the petition which contains the following provisions: "The assured, upon the occurrence of an accident, shall give immediate written notice thereof, with the fullest information obtainable at the time, to the American head office of the corporation, or to one of its duly authorized agents. The assured shall give like notice, with full particulars, of any claim made on account of such accident."

The demurrer of plaintiff is based upon the thought that no liability exists on account of the failure of the insured to give immediate written notice of the accident as required by the terms of the policy. A provision in an insurance policy of this nature requiring immediate written notice of the occurrence of an accident is not unreasonable. Its purpose is to enable the insurer to promptly inform itself concerning the same, so that it may investigate the circumstances, prepare for a defense, if necessary, or be advised whether it is prudent to settle any claim arising therefrom. Some courts construe such provisions strictly in favor of the insurer. Northwestern Telephone Exchange Co. v. Maryland Casualty Co., 86 Minn. 467, 90 N. W. 1110; Underwood Veneer Co. v. London Guarantee & Accident Co., 100 Wis. 378, 75 N. W. 996; Employers' Liability Assurance Corporation v. Light, Heat & Power Co., 28 Ind. App. 437, 63 N. E. 54; Travelers' Ins. Co. v. Myers, 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760; National Construction Co. v. Travelers' Ins. Co., 176 Mass. 121, 57 N. E. 350; Rooney v. Maryland Casualty Co., 184 Mass. 26, 67 N. E. 882.

The principle stated, however, in our view does not cover or determine the question presented in this case. The agreement in the policy is that defendant will "indemnify the assured against loss from the liability imposed by law upon the assured for damages, on account of bodily injuries (including death at any time resulting therefrom) accidentally suffered," etc. Defendant agrees further "to contest claims and to defend suits, even if groundless, made or brought against the assured on account of such bodily injuries or death." The notice required is "upon the occurrence of an accident" and "of any claim made on account of such accident." An insurance contract, like any

other, must be reasonably construed. The contract does not require that all accidents resulting from the use of the automobile should be made the subject of a notice, and many accidents might happen in the use of the machine which are not the subjects of indemnity under the policy. Accidents resulting in injury to the owner himself or to the property of others are not included. The purpose was to protect the insured from liability against damages for bodily injuries accidentally suffered, and it is only those accidents which result in bodily injuries which are embraced within its terms. In determining the question presented, the meaning of the terms "immediate written notice" and of the word "accident," as used in the policy, becomes important. Since the giving of "immediate" notice would in most cases, if the word were defined in its strictest sense, be impossible, courts generally hold that the word "immediately" does not mean instantly, but is to be construed as meaning within a reasonable time having regard to all the circumstances. Empire State Surety Co. v. Northwest Lumber Co., 203 Fed. 417, 121 C. C. A. 527; Columbia Paper Stock Co. v. Fidelity & Casualty Co., 104 Mo. App. 157, 78 S. W. 320; National Paper Box Co. v. Ætna Life Ins. Co., 170 Mo. App. 361, 156 S. W. 740; Odd Fellows' Fraternal Accident Ass'n v. Earl, 70 Fed. 16, 16 C. C. A. 596.

The word "accident" is susceptible of and has received many definitions, varying with the connection in which it is used. It is: "An event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event; chance; contingency; often an undesigned and unforeseen occurrence of an afflictive or unfortunate character; casualty; mishap; as, to die by an accident." Webster's New International Dictionary. In the Century Dictionary, among the definitions given are: "2. Specifically, an undesirable or unfortunate happening; an undesigned harm or injury; a casualty or mishap." As used in an indemnity policy such as this, we are of opinion that the word "accident" means an undesigned and unforeseen occurrence of an afflictive or unfortunate character, resulting in bodily injury to a person other than the insured. It is evident that it cannot have been the intention of the parties that such an accident as a mishap, casualty, or misadventure occurring without bodily injury to any one should be reported, since with such an occurrence defendant has no concern.

To illustrate: Suppose that in carelessly closing the door of the automobile the man in charge should inflict a slight or trivial bruise upon a passenger or bystander, of which no present external indication appeared, and as to which the individual disclaimed any injury or suppose that the finger of such a one was pricked or his skin abrased in some manner, resulting from the use of the automobile—would the policy make it imperative that immediate notice of such occurrence should be given, upon the penalty of a loss or forfeiture of the insurance in case an injury later developed? We cannot take this view. If

no apparent injury occurred from the mishap, and there was no reasonable ground for believing at the time that bodily injury would result from the accident, there was no duty upon the assured to notify the insurer. The Court of Appeals of Missouri has said: "An injury might be of such character as to afford, at first, no reasonable ground for thinking that it might support a claim for damages against the employer. In such case we think the assured would not be required, under the reasonable rule of construction we are discussing, to give the assurer notice until such time as the facts of the injury and its progress began to suggest to a person of reasonable care and prudence that a possible liability of the assured to answer in damages lurked in them. * * * Frequently an injury, apparently too trivial to cause any damage or inconvenience, develops into a most serious phase. The duty of the assured in such instances with respect to giving notice is performed if he gives notice within a reasonable time after the injury first takes on a serious aspect, an aspect suggestive of a possible claim for damages." National Paper Box Co. v. Ætna Life Ins. Co., supra.

This language states the true principle, and in our opinion is determinative of this case. Accidents occurring to bicycle riders, which throw them to the pavement, are of very frequent occurrence, and it is a matter of common knowledge that as a rule they do not result in serious consequences. At the time and shortly after the collision Lewis stated that he had received no injury. If he had received no injury, or if the accident would not in an ordinary mind induce a reasonable belief that it might result in bodily injury, there was no obligation to notify the insurance company. At the time that the plaintiff first received knowledge that Lewis was injured, and that a claim was liable to be made upon him for damages, he immediately notified the insurance company, and from that time on performed all the conditions which he was required to perform under the conditions of the policy. We cannot say as a matter of law that the conditions attending the accident were such as to bring it within the class of which it was his duty to give notice, or that the notice he did give was not given within a reasonable time considering all the circumstances of the case. We have said with respect to a case where notice was not given within the time specified in a policy and an excuse was offered: "The question of the sufficiency of the excuse offered and the reasonableness of the time in which the act is performed [is] to be determined according to the nature and circumstances of each individual case, the beneficiary in all cases being required to act with due diligence and without laches on his part." Woodman Accident Ass'n v. Pratt, 62 Neb. 673, 687, 87 N. W. 546, 551 (55 L. R. A. 291, 89 Am. St. Rep. 777).

The defendant having elected to stand upon the demurrer, the facts alleged in the petition are admitted, and since we cannot say as a matter of law that the notice was insufficient, the judgment of the district court was correct, and is affirmed.

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